Supreme Court, U.S.
FILED
04 376 SEP 17 2004
OFFICE OF THE CLERK

No. 04-____

IN THE
Supreme Court of the United States

LEON WOLFORD,
Petitioner,

v.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

CECIL W. LAWS
Counsel of Record
239 E. New Street
Kingsport, Tennessee 37660
(423) 246-9254

Counsel for Petitioner

September 17, 2004

QUESTION PRESENTED

Did the United States Court of Appeals for the Sixth Circuit so far depart from the ordinary course of judicial proceedings as to justify a summary reversal of its judgment by failing to take the evidence in the light most favorable to the verdict winner and instead made its own factual finding that petitioner was not injured by the fraud that was perpetrated upon him?

PARTIES TO THE PROCEEDING

Leon Wolford was the plaintiff-appellee in the proceedings below.

Massachusetts Mutual Life Insurance Company was a defendant in the district court proceedings and the appellant in the court of appeals proceedings.

MML Pension Insurance Company and C.M. Life Insurance Company were defendants in the district court proceedings, but they did not participate in the court of appeals proceedings.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

FEDERAL RULE INVOLVED 1

INTRODUCTION 2

STATEMENT 2

REASONS FOR GRANTING THE PETITION 8

THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWER TO CORRECT THE SIXTH CIRCUIT'S MANIFEST DISREGARD OF RULE 50 8

A. The Sixth Circuit Was Obliged To Review The Evidence In The Light Most Favorable To Petitioner 9

B. Overwhelming Evidence Of MassMutual's Fraud Supports The Jury Verdict 10

C. The Court Of Appeals' Explanation For Overturning The Jury Verdict Has No Merit 13

D. Summary Reversal Is An Appropriate Disposition 18

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Liberty Lobby, Inc., 477 U.S. 202 (1986) 9

Brown v. Birman Managed Care, 42 S.W.2d 62 (Tenn. 2001) 17

Byrd v. Blue Ridge Rural Elec. Coop., Inc., 365 U.S. 525 (1958) 15, 16

Dimick v. Schiedt, 293 U.S. 474 (1935) 15

Galloway v. United States, 319 U.S. 372 (1943) 14

Gibson v. Phillips Petroleum Co., 352 U.S. 874 (1956), *rev'g* 232 F.2d 13 (5th Cir. 1956) 18

Lytle v. Household Mfg. Inc., 494 U.S. 545 (1990) 10

Medley v. A. W. Chesterton Co., 912 S.W.2d 748 (Tenn. Ct. App. 1995) 17

Myers v. Pickering Firm, Inc., 959 S.W.2d 152 (Tenn. Ct. App. 1997) 17

Neely v. Martin L. Eby Constr. Co., 386 U.S. 317 (1967) 14

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000) 10

Swafford v. Atlantic Coast Line R.R., 350 U.S. 807 (1955), *rev'g* 220 F.2d 901 (5th Cir. 1955) 18

Union Trust Co. v. Eastern Air Lines, Inc., 350 U.S. 907 (1955), *rev'g* 221 F.2d 62 (D.C. Cir. 1955) 18

Weisgram v. Marley Co., 528 U.S. 440 (2000) 14

Williams v. Carolina Life Ins. Co., 348 U.S. 802 (1954), *rev'g* 210 F.2d 477 (5th Cir. 1954)..... 18

CONSTITUTION, STATUTES, AND RULES

U.S. Const.:

Amend. V (Due Process Clause)..... 19

Amend. VII 15, 19

Right To Jury Trial Clause 19

Reexamination Clause 19

28 U.S.C. § 1254(1) 1

Fed. R. Civ. P. 50 .....*passim*

OTHER MATERIALS

9A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* (2d ed. 1995)..... 18

IN THE

Supreme Court of the United States

LEON WOLFORD,
Petitioner,
v.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Leon Wolford respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The district court's opinion (Pet. App. 8a-66a) is unreported. The court of appeals' opinion (*id.* at 1a-7a) is unreported.

JURISDICTION

The court of appeals' judgment was entered on February 24, 2004. A petition for rehearing was denied on May 20, 2004. Pet. App. 67a. On August 9, 2004, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including September 17, 2004. *Id.* at 68a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL RULE INVOLVED

Federal Rule of Civil Procedure 50 is set forth at Pet. App. 69a-71a.

INTRODUCTION

In its opinion below, the United States Court of Appeals for the Sixth Circuit cast aside the findings of the jury, which had been reviewed and affirmed by the district court on a motion for judgment as a matter of law under Federal Rule of Civil Procedure 50. The jury expressly found on their verdict form that petitioner had proven all of the elements of fraud and had been damaged in the amount of $1.9 million by that fraud. However, the Sixth Circuit disregarded those factual findings and instead determined, on the strength of its review of the testimony in the cold record, that petitioner would have been victimized and fired by the insurance company for which he served as an agent regardless of the fraud that it perpetrated against petitioner. The court therefore held that petitioner had suffered no damages. That reweighing of the evidence is precisely what Rule 50 and the Seventh Amendment forbid. The court's judgment thus represents a radical departure from the ordinary course of proceedings in the Courts of Appeals. Because that departure from normal standards is so severe – no other appellate court has so broadly viewed its power to review a Rule 50 motion – and the personal consequences to petitioner so devastating, summary reversal is warranted.

STATEMENT

Petitioner Leon Wolford ("Wolford") had been a special agent representing respondent Massachusetts Mutual Life Insurance Company ("MassMutual") for more than two decades when the events that led to this case occurred. He worked with MassMutual as a special agent pursuant to a series of career contracts entered into with general agents of MassMutual, most recently general agent Tom King ("King"). Wolford was recognized as a valuable producer for MassMutual. As a reward for his productivity, he was entitled to vested commissions, for the first five (5) years of the policies, on the sales he made, so long as the premiums on those policies were paid, even if his career contract were terminated. Moreover, for as long as he remained

under a career contract with MassMutual's general agent King, he was entitled to collect certain non-vested commissions, after five (5) policy years, on those sales as well. *See* Pet. App. 1a-2a; C.A. App. 193. The non-vested commissions were lost however if Wolford's career contract were terminated.

In the early 1990s, Wolford and MassMutual collaborated to create a new type of insurance package for employees and managers of coal mines. Those policies were designed to take the place of state workers' compensation programs. The package involved insurance to coal miners who worked underground no more than six (later eight) hours per week. A vice-president of MassMutual had "worked directly with Wolford and approved the package, believing it would be good for both MassMutual and miners." Pet. App. 20a. As any good agent would, Wolford aggressively marketed this new policy to miners. Although MassMutual obviously believed at the program's inception that such a line of business would be profitable, it eventually came to regret its decision to issue those kinds of policies. Claims mounted and MassMutual's financial exposure increased so much that the amount of the claims ($1,096,869) it had paid on these policies was virtually the same as the non-vested commissions ($1,000,000) it owed to Wolford. *See* C.A. App. 1057-58, 1271-74.

To recoup its losses, MassMutual undertook a scheme to force Wolford's resignation so that it could avoid paying commissions to him. MassMutual launched an investigation of Wolford's practices in issuing the insurance policies for the miners. Based on what it purportedly learned, MassMutual falsely claimed that Wolford had violated several of its rules and policies. MassMutual's persistent campaign of lies and fraudulent misrepresentations was aimed at convincing its general agent, King, to terminate Wolford's career contract. In furtherance of this plan, it told King that Wolford had violated MassMutual's rules for filling out claim forms; that Wolford had intentionally submitted applications from unqualified miners; and that

Wolford had committed insurance fraud by falsifying a claim form. In time, discovery demonstrated that each of those accusations was false and, indeed, that MassMutual knew at the time that each of these claims was false.[1] The falsity of the representations was confirmed by the jury's verdict, by the district court's ruling on MassMutual's Rule 50 motion, and even by the Sixth Circuit itself. *See* Pet. App. 2a-3a.

Eventually, MassMutual made the false representation, through its general agent King, that, if Wolford were to resign his career contract and instead take a broker's contract, he would retain certain benefits, and that, if he did not, he would face criminal charges and possibly other proceedings against him. *See* C.A. App. 502 (letter from King to Wolford stating that it appeared that Wolford had defrauded MassMutual and thus faced "lifetime cancellation of [his] insurance and securities licenses, financial loss to [him], for losses MassMutual have [*sic*] as a result of you[r] actions, possibly millions, *and possible time in jail*") (emphasis added). Wolford resigned his career contract in reliance on MassMutual's representations and entered into a broker's contract.[2] Wolford's career contract

---

[1] As but one example of MassMutual's tactics, MassMutual accused Wolford of falsifying application information for nine miners. MassMutual later noticed the deposition of nine miners, and, after the videotaped depositions of the first five miners revealed that Wolford had done nothing wrong, MassMutual cancelled the remaining four depositions. *See* Pet. App. 22a-23a.

[2] Under a career contract, Wolford was entitled to have health insurance and pension benefits, whereas under a broker's contract he was not. The Sixth Circuit cited generic testimony suggesting that Wolford's commission entitlements would be the same under either type of contract, *see* C.A. App. 945, but ignored more specific testimony showing that he lost certain of his commissions as a result of the resignation, *see id.* at 1280-81. Vested commissions under the career contract were for premiums for up to five (5) years from the inception of the policies, even if the career contract was terminated during that five (5) year period. Non-vested commissions – *i.e.*, those after five (5) years from policy inception – were forfeited if the career contract was terminated.

provided that vested commissions were those paid during the first five (5) years on any insurance policies sold by Wolford. Non-vested commissions were paid to Wolford for premiums paid after year five (5) of the policies. Termination of the career contract for any reason meant the non-vested commissions were lost, but termination of the contract did not result in the loss of vested commissions. *See id.* at 193. Mass-Mutual produced documents that proved that Wolford's non-vested commissions under his career contract were more than $900,000 as of 1996. *See id.* at 506-07. King testified that Wolford's non-vested renewal commissions were more than $1 million when he resigned in 1997. *See id.* at 1057-58.

Unlike the career contract, the broker contract makes no provision for vested commissions. *See id.* at 466-67. King explained that he negotiated approval of the broker's contract for Wolford with MassMutual's executives before Wolford resigned. He did so to allow Wolford to continue servicing his existing clients, particularly the pension plans, annuities, and life insurance to prevent that business from leaving MassMutual. Wolford would not be allowed to solicit new customers under the broker's contract. *See id.* at 1041-42. That broker's contract was terminated by MassMutual approximately two months later. *See id.* at 465-67, 473-74, 1041-43, 1045. Wolford subsequently commenced this action.

2. At trial, the jury heard King's testimony that he would not have considered firing Wolford absent the campaign of misinformation undertaken by MassMutual, which sought to portray Wolford as a "rogue agent." C.A. App. 1037. Indeed, King testified that MassMutual had (falsely) represented to him that it had witnesses who would testify that Wolford had lied on their applications and that some insureds would claim Wolford never told them they could not work underground. King testified that these lies led him to tell Wolford that Wolford had "a deep hole to dig out of." *Id.* at 502 (Tr. King).

After hearing all of the evidence of MassMutual's scheme to induce Wolford to resign and thereafter use his commissions to defray its losses, the jury returned a verdict in Wolford's favor, finding that MassMutual had defrauded him and that he had been damaged in the amount of $1.9 million. In its Rule 50 motion in the trial court, MassMutual argued, among other things, that Wolford had not been damaged by the resignation that it had induced, because Wolford operated under an at-will contract that MassMutual could have chosen to terminate without penalty at any time. Respondent nonetheless said that "upon [petitioner's] termination [petitioner] would continue to receive certain 'vested commisions' but would lose any 'non-vested commissions.'" *Id.* at 771-72.

In a point expressly affirmed by the Sixth Circuit, the district court held that MassMutual "had no direct power to terminate Wolford under his contract." Pet. App. 2a. Instead, the general agent who had contracted with Wolford, King, had that authority. Accordingly, MassMutual's fraudulent scheme was necessary to reach its desired end, and the district court denied MassMutual's Rule 50 motion. The district court explicitly found:

> MassMutual's fraud damaged Wolford: Damages to Wolford included his loss of non-vested renewal commissions of approximately $1 Million, fringe benefits, office expenses, pension benefits . . . . Wolford avers MassMutual's termination of the broker contract was deceptive, but, even if he had not been granted a broker contract, *severe damage to him had already been caused by MassMutual's fraudulent inducement to resign from his career contract.*

Id. at 43a-44a (emphasis added).

* * * * *

> The jury was presented with evidence Wolford suffered the following damages:
>
> (1) lost renewal commissions of approximately $1,000,000;
>
> (2) lost pension benefits of nearly $400,000;
>
> (3) lost annual office expense reimbursement of 35% of his compensation, which totals approximately $125,000, i.e., $50,000 per year from July 1997-May 2000;
>
> (4) lost fringe benefits of $70,000, i.e., $28,000 x 2-1/2 years; and
>
> (5) lost income between July 1997 and the trial of approximately $399,400
>
> Thus, Wolford's damages as of the trial date were at least $1,994.000.

Id. at 59a.

MassMutual appealed the district court's decision to the United States Court of Appeals for the Sixth Circuit.

3. The court of appeals reversed the district court's denial of MassMutual's Rule 50 motion. Pet. App. 1a-7a. It held that Wolford had not suffered any damages from MassMutual's fraudulent misrepresentations because, the court reasoned, Wolford would have been fired from his position by King had he not resigned. *See id.* at 6a-7a. In the court's view, Wolford could not establish a causal link to damages from his resignation because King would have fired him anyway.

REASONS FOR GRANTING THE PETITION

The court of appeals entirely supplanted the jury's role by reweighing the evidence and testimony based on the cold record. To reach its holding predicated on what hypothetically would have happened without MassMutual's fraud, the court entirely discounted King's testimony that he would not have fired Wolford absent MassMutual's scheme. The jury heard all of the evidence in the case and properly found that Wolford would never have resigned absent MassMutual's lies, and that King would not have terminated him either. The Sixth Circuit's decision, which is directly contradicted by evidence that clearly supports the jury's verdict, is a clear violation of Federal Rule of Civil Procedure 50. That rule requires that, on appellate review, the evidence must be taken in the light most favorable to the party that won the jury verdict. Although this Court ordinarily does not sit in review of errors, the court of appeals' judgment is such an unusual departure from the ordinary course of judicial proceedings in a case involving devastating personal consequences that this Court should exercise its authority to correct the court of appeals' error by summary reversal.

THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWER TO CORRECT THE SIXTH CIRCUIT'S MANIFEST DISREGARD OF RULE 50

The Sixth Circuit's crucial error came in reversing the jury's finding that Wolford was fraudulently induced by MassMutual to resign from his career contract and suffered damages as a result. The jury, the district court, and the court of appeals all agreed that Wolford's resignation was caused by MassMutual's fraud. Thus, the Sixth Circuit recognized that, "had the fraud not occurred, Wolford would not have resigned." Pet. App. 7a. However, it nevertheless reversed the jury's verdict on the strength of its erroneous factual finding that, even absent the fraud, "King would have fired him, leaving Wolford in exactly the same position he is in now – that is, without

the non-vested commissions or other damages he claims." *Id.*

The Sixth Circuit's factual finding in this regard relies on nothing more than King's statement that, had Wolford not resigned, King would have fired him. That testimony – stripped of its evidentiary context, including King's other testimony – is woefully insufficient to overturn the jury's verdict under Rule 50. The record contains substantial evidence that the jury reasonably accepted. That evidence fully supported the verdict that MassMutual's fraud caused Wolford's damages.

A. The Sixth Circuit Was Obliged To Review The Evidence In The Light Most Favorable To Petitioner

In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 202 (1986), this Court stated that, when deciding a Rule 50 motion,

> the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict.

Id. at 252.

In considering a Rule 50 motion, this Court has stressed that "the standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same.' It therefore follows that, in entertaining a motion for judgment as a matter of law, the court should review *all of the evidence in*

the record." Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 150 (2000) (emphasis added). *See also, e.g., Lytle v. Household Mfg. Inc.*, 494 U.S. 545, 554-55 (1990) (noting that, on motion for directed verdict, "the court does not weigh the evidence but draws all factual inferences in favor of the nonmoving party").

B. Overwhelming Evidence Of MassMutual's Fraud Supports The Jury's Verdict

The jury unquestionably had sufficient evidence to support its conclusion that MassMutual committed fraud and that Wolford suffered damages from that misconduct. After resigning from his career contract, Wolford entered into a broker contract with MassMutual. He resigned his career contract at King's suggestion to retain his renewal commissions, as well as to avoid: losing his securities and insurance licenses, facing threatened criminal prosecution by MassMutual, and losing millions of dollars in commissions from MassMutual. Ample evidence, which the jury and the district court accepted, proved that, but for MassMutual's fraud, neither resignation nor termination would have occurred.

King testified that MassMutual's false accusations at a June 1997 meeting had convinced him that Wolford was a "rogue agent." C.A. App. 1037 (Tr. King). He also stated that, but for MassMutual's persistent, fraudulent accusations, which lasted for months on end, he would never have considered terminating Wolford. King testified that he believed at the time that MassMutual's false accusations against Wolford were the truth. *See id.* at 1093, 1100 (Tr. King). King stated that, after MassMutual made its accusations, he told Wolford he would have to terminate Wolford unless Wolford could prove that those accusations were false. *See id.* at 1093-96 (Tr. King). Most importantly, King confirmed that he would not terminate an employee unless he was convinced that they had broken the rules:

> Q. Had you an employee that the same information was presented to you by the field Practices Review Committee, that is, that the person was violating company rules, misrepresenting policies, and changing documents, would you terminate that person?
>
> A. I would not have terminated that person without asking them to prove that the evidence that I had was inaccurate . . . . I would not have terminated the person unless I had given the person an opportunity and a full opportunity to explain the situation and to defend their position. I would never have terminated a person saying they did something, knowing that they have a clean reputation . . . .

Id. at 1104-05 (Tr. King).

The evidence in the record from King demonstrated how MassMutual's accusations about Wolford's alleged misconduct – which all proved to be untrue – poisoned King against Wolford. For example:

- King testified that following his June 1997 meeting he was convinced by MassMutual's false accusations that Wolford was a "bad apple" and a "rogue agent." King testified that he told Wolford: "Leon, buddy, I don't know how you could have done all this stuff. I don't even know what it all is. Did they tell you (Wolford) what they said you did? He said 'Well they wouldn't give me any names but they are accusing me of doing this and accusing me of doing that.'" *Id.* at 1037 (Tr. King).

- King stated that, based on the false accusations at the June 1997 meeting, "I knew what they described was a rogue agent I couldn't believe could have occurred, I know that I was very frustrated and I know that I felt Leon had let me down and disappointed me and how he could have pulled off the things they said he did were beyond my comprehension." *Id.* at 1093-94 (Tr. King).
- King said that MassMutual told him they had "five people that are willing to testify that Leon Wolford lied on their applications. We have ten people that are willing to say that Leon Wolford never told us we could go underground or couldn't go underground. We have these numbers of people that did this. Every time I asked for a name, they wouldn't give it to me." *Id.* at 1095 (Tr. King).
- King testified that he told Wolford he "better take the information you got and piece it together and find out what the heck they are talking about or they'll come after your whole pocketbook." *Id.* (Tr. King).
- King believed that he would be forced by MassMutual to terminate Wolford's career contract and that, if he refused, "They would terminate me, if I didn't terminate him." *Id.* at 1090 (Tr. King).

Wolford also introduced a substantial amount of evidence showing that MassMutual had every motivation to induce his resignation, because it had no right or power to terminate him lawfully and it wanted to offset claims from his clients with his non-vested commissions. *See id.* at 956-57, 1185-86, 1229-30, 1250. King testified that Wolford's non-vested commissions were more than $1 mil-

lion when the 1996 and 1997 totals were included. *See id.* at 1057-58. MassMutual admitted the real reason Wolford was losing his commissions was to compensate for the claims for benefits from Wolford's clients (*see id.* at 1059), which totaled approximately $1.4 million (*see id.* at 1271-74). MassMutual conceded that its decision to insure miners had been a mistake (*see id.* at 1161) and that, after the claims first arose, it began looking for a smoking gun to use against Wolford (*see id.* at 1182, 1185-6). During its sham investigation, MassMutual's vice-president requested that the amount of Wolford's commissions be calculated. *See id.* at 1230-31, 1250. All of that evidence lends further support to the jury's verdict that MassMutual committed fraud so that it could recoup its losses on insurance contracts out of Wolford's commissions.

It would be contrary to the evidence, and strongly against the reasonable inferences that must be drawn in Wolford's favor, to conclude that he would have resigned on his own and forfeited his non-vested commissions and pension. The court of appeals correctly concluded that, but for MassMutual's fraud, Wolford would not have resigned. *See* Pet. App. 6a-7a. Moreover, there was also legally sufficient evidence in the record to support the jury's implicit finding that King would not have fired Wolford but for MassMutual's fraud.

C. The Court Of Appeals' Explanation For Overturning The Jury Verdict Has No Merit

In reversing the jury's verdict in the face of the foregoing evidence that King would never have considered terminating Wolford but for MassMutual's fraud, the Sixth Circuit improperly reweighed the evidence and reached a conclusion that Rule 50 simply does not permit. The court drew unreasonable inferences in favor of MassMutual, namely that King would have fired Wolford even if MassMutual had not falsely accused Wolford and used those false accusations as its basis for requesting that King terminate Wolford. *See* Pet. App. 7a n.2 ("Wolford argues that King testified that he would not have fired

Wolford without a reason, but this testimony was only referring to MassMutual's initial request."). That conclusion is sheer speculation, impermissibly draws an inference in *MassMutual's* favor, and is not supported by the record facts set forth above. *See, e.g., Galloway v. United States*, 319 U.S. 372, 395 (1943) ("Whatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked.").

One indicium of the Sixth Circuit's utter disregard of the trial proceedings is that its opinion reversing the district court's denial of MassMutual's Rule 50 motion does not contain a single mention of the district court's 65-page opinion denying that motion. This Court has warned that "courts of appeal should 'be constantly alert' to 'the trial judge's first-hand knowledge of witnesses, testimony, and issues'; in other words, appellate courts should give due consideration to the first instance decision maker's 'feel for the overall case.'" *Weisgram v. Marley Co.*, 528 U.S. 440, 443-44 (2000). When this Court considers a case in which a jury verdict has been reversed by a circuit court, "[p]art of the Court's concern has been to protect the rights of the party whose jury verdict has been set aside on appeal." *Neely v. Martin L. Eby Constr. Co.*, 386 U.S. 317, 325 (1967).

The court of appeals also overlooked MassMutual's letters to King requesting Wolford's termination. For example, MassMutual's first request in March 1997 to terminate Wolford gave as its reason only the claim form. *See* C.A. App. 439. Its letters on July 8 and 11, 1997, list both the claim form and solicitation of unqualified miners as bases for their request that King terminate Wolford. *See id.* at 463-64.

The district court heard and saw all the evidence; it reviewed MassMutual's Rule 50 motion and briefs; and it found the evidence clearly sufficient to support the verdict

reached by the jury. Pet. App. 38a-47a, 58a-61a. The court of appeals made no reference to the district court's careful consideration of the issues in this case. Instead, it merely reversed that decision by speculating about matters contradicted by the evidence. That kind of substitution of the trial court's and jury's judgment eviscerates the jury trial right and Reexamination Clause of the Seventh Amendment and impermissibly negates the "essential characteristic" allocating the "functions between judge and jury." *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 365 U.S. 525, 537 (1958). *See also Dimick v. Schiedt*, 293 U.S. 474, 486 (1935) (noting that the "controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine the facts . . . both parties are entitled to have a jury properly determine the question of liability and the extent of the injury by an assessment of damages [because] [b]oth are questions of fact").

The evidence and the standards for Rule 50 review dictate the only proper conclusion that the court of appeals could have reached: "Had the fraud not occurred, Wolford would not have resigned [*and*] King would [*not*] have fired him, leaving Wolford in exactly the same position he [*was in before the fraud*] – that is, [*with*] the non-vested commissions [*and*] other damages he claims." The court of appeals should have upheld the jury's implicit finding that, but for MassMutual's fraud, Wolford would still be working for King under his career contract and would still be receiving all the benefits of that contract.

The Sixth Circuit's decision is contrary to decades of jurisprudence in civil cases concerning the respective division of functions between judge and jury under the Seventh Amendment. The Court has said that an essential characteristic of the federal system

> is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and under the influence – if not the command – of the Seventh

> Amendment, assigned the decisions of disputed questions of fact to the jury.

Byrd, 356 U.S. at 537-38.

The Sixth Circuit's decision that, as a factual matter, King would have terminated Wolford even if MassMutual had not behaved fraudulently not only usurped the jury's fact-finding function, but also misapprehended the essence of the cause and effect of the fraud in this case and the substantive state law remedy for fraud. The court of appeals identified the remedy for fraud and stated:

> The damages for fraud are calculated by placing the injured party in the same position he would have occupied had the fraud not occurred. Here, had the fraud not occurred, Wolford would not have resigned *but King would have fired him*, leaving Wolford in exactly the same position he is in now – that is, without the non-vested commissions or other damages he claims.

Pet. App. 7a (emphasis added; citation omitted). The issue is not where Wolford would be *but for his resignation*, *i.e.*, terminated by King, as the court of appeals misapprehended. The issue is where Wolford would be *but for MassMutual's fraud*, *i.e.*, with his career contract in place, and retaining his non-vested commissions of $1 million, his $600,000 in pension, and his other benefits.[3]

---

[3] There is further evidence that the court of appeals simply misapprehended the testimony in this case. It overlooked evidence that, once Wolford resigned his career contract, he lost his non-vested commissions of more than $700,000 and pension benefits of more than $600,000. *See* C.A. App. 1280-81. The court of appeals opined that "[i]t was only after King, at MassMutual's direction, terminated the broker contract that Wolford lost his non-vested commissions." Pet. App. 5a (citing C.A. App. 945). That conclusion ignored testimony from MassMutual's executive that, upon the termination of his career contract, Wolford lost non-vested renewal commissions and other compensation. *See* C.A. App. 1280-81; *supra* note 2. Thus, despite the court of appeals' erroneous factual finding, those damages are directly traceable

Instead of accepting the jury's view of the evidence, the court of appeals drew an inference quite to the contrary, concluding that King would have fired Wolford had he not resigned. That faulty inference is the crux of the Sixth Circuit's decision to reverse the jury's verdict. It required reliance on judicially imagined evidence that is irreconcilable with the record facts – *i.e.*, but for the fraud King would still have terminated Wolford. And, indeed, had King actually terminated Wolford's career contract as a result of MassMutual's defamatory misrepresentations, Wolford would have been injured, but he would not have been without a remedy. Besides fraud, he could have also sued for defamation of character, pursuant to *Myers v. Pickering Firm, Inc.*, 959 S.W.2d 152 (Tenn. Ct. App. 1997); civil conspiracy under *Brown v. Birman Managed Care*, 42 S.W.2d 62 (Tenn. 2001), because King's contract with Wolford was in King's individual capacity, not as MassMutual's agent; and outrageous conduct as permitted by *Medley v. A. W. Chesterton Co.*, 912 S.W.2d 748 (Tenn. Ct. App. 1995). However, because Wolford's career contract was not terminated by King, any claim for wrongful termination would surely have been challenged by claiming that Wolford resigned, which ultimately would lead back to the fraudulent inducement claims that were the basis of the jury's verdict.

The Sixth Circuit acknowledged that MassMutual's fraud caused Wolford's resignation, yet it refused to acknowledge the damages Wolford suffered as a result of that fraud. Neither resignation nor termination would have occurred but for MassMutual's fraudulent and pretextual scheme against him. MassMutual admitted to King that it wanted to offset the claim payments it had to make to Wolford's clients against Wolford's non-vested commissions, and that the reason for its accusations was "the liability he [Wolford] created for the home office."

---

to MassMutual's efforts to induce Wolford's resignation from his career contract, and are separate and distinct from termination of the broker's contract.

C.A. App. 1058-59. The district court's opinion states: "Thus by inducing his resignation, MassMutual could capture Wolford's commissions to set-off against the insurance claims. As King put it: "I asked the question, why are they not going to release the renewal streams and so forth. . . . The answer given to me was 'a large reason is the liability he created for the Home Office.'" Pet. App. 47a.

D. Summary Reversal Is An Appropriate Disposition

The Sixth Circuit's judgment so far departs from the correct manner of reviewing Rule 50 motions that summary reversal is warranted. This Court has exercised its authority to reverse summarily in cases in which the judgment it is reviewing is so extreme that full review and briefing on the merits would merely announce a rule that every other court properly understands and applies.

As Wright and Miller explain, this Court "in a little noticed series of per curiam opinions . . . has reversed judgments of lower courts that had substituted their views of the sufficiency of the evidence for that of the jury." 9A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2526, at 281 (2d ed. 1995). These cases include: *Gibson v. Phillips Petroleum Co.*, 352 U.S. 874 (1956), *rev'g* 232 F.2d 13 (5th Cir. 1956); *Union Trust Co. v. Eastern Air Lines, Inc.*, 350 U.S. 907 (1955), *rev'g* 221 F.2d 62 (D.C. Cir. 1955); *Swafford v. Atlantic Coast Line R.R.*, 350 U.S. 807 (1955), *rev'g* 220 F.2d 901 (5th Cir. 1955); and *Williams v. Carolina Life Ins. Co.*, 348 U.S. 802 (1954), *rev'g* 210 F.2d 477 (5th Cir. 1954). The Sixth Circuit did not review the evidence of the eight-day trial, nor did it discuss the district court's comprehensive ruling denying MassMutual's Rule 50 motion. Instead, the court of appeals' opinion casts a blind eye upon a malicious and concerted fraudulent scheme to strip a 25-year career agent of nearly $2 million. It disassociated MassMutual's fraud – the cause of Wolford's resignation and reason for King's statement that he would have terminated Wolford

had he not resigned – from the effect of the fraud in causing Wolford's damages. The facts as recited by the Sixth Circuit do not exist in the record; indeed, that version of the facts is the diametric opposite of the facts presented at trial and reasonably relied on by the jury and the district court.

For the Due Process Clause of the Fifth Amendment and the Right to Jury Trial and Reexamination Clauses of the Seventh Amendment to retain their vitality, this Court should summarily reverse the Sixth Circuit's decision.

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment of the court of appeals should be summarily reversed.

Respectfully submitted,

CECIL W. LAWS
Counsel of Record
239 E. New Street
Kingsport, Tennessee 37660
(423) 246-9254

Counsel for Petitioner

September 17, 2004

APPENDIX

TABLE OF CONTENTS

Page

APPENDIX:

A. Opinion of United States Court of Appeals for the Sixth Circuit (Feb. 24, 2004) 1a

B. Memorandum Opinion and Order of United States District Court for the Eastern District of Tennessee (Knoxville) (Apr. 23, 2001) 8a

C. Order of United States Court of Appeals for the Sixth Circuit Denying Rehearing (May 20, 2004) 67a

D. Letter from Supreme Court Clerk regarding extension request for filing a petition for a writ of certiorari (Aug. 9, 2004).....68a

E. Federal Rules of Civil Procedure Involved 69a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 01-5694 & 02-6336

LEON WOLFORD,
Plaintiff-Appellee,

v.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
Defendant-Appellant.

[Decided Feb. 24, 2004]

SILER, Circuit Judge.

In this Tennessee diversity case, a jury found that Massachusetts Mutual Life Insurance Company ("MassMutual") fraudulently induced Leon Wolford into resigning his "career" contract with General Agent Tom King. MassMutual appeals the district court's denial of its multiple post-judgment relief motions arguing that (1) it cannot be liable of fraudulently inducing Wolford to resign his contract when the contract was at-will; (2) there was insufficient evidence for the jury to find fraud; (3) the district court improperly awarded punitive damages; and (4) the district court should have reopened the case based on the discovery of a recording of the telephone conversation between its agent King and Wolford during which the fraudulent inducement occurred. We REVERSE for the reasons stated hereafter.

FACTUAL BACKGROUND

MassMutual contracts with "general agents" to sell and maintain its insurance policies. The "general agents" in turn contract with "special agents" to also sell and maintain the policies. Pursuant to this arrangement, MassMutual entered into an at-will contract with General

Agent King, who in turn entered into an at-will "career" contract with Special Agent Wolford. Under this career contract, Wolford would collect "non-vested" renewal and persistency commissions in the future as long as he was still under this contract. When Wolford eventually resigned, these renewals totaled approximately $1 million.

In March 1997, allegations surfaced accusing Wolford of falsely adding to a doctor's report on an insured client's claim and of extending policies to ineligible people. Wolford had come up with an attractive "package" for coal miners providing life, disability, and health insurance as an alternative to costly worker's compensation insurance. MassMutual had a requirement that no policy be issued to a miner who worked more than six hours per week underground. The allegations accused Wolford of misrepresenting several miners' job titles to get around this requirement and also of filling in parts of a doctor's certification regarding the claim of Grant Norman under his insurance policy. MassMutual's Field Practices Committee ("FPC") investigated these allegations and elected to terminate Wolford.

However, because MassMutual had no direct power to terminate Wolford under his contract, it directed King to fire Wolford. MassMutual asked King to terminate Wolford, but King resisted, wanting to know MassMutual's reasons. MassMutual claimed that Wolford improperly supplemented the doctor's report. After it was found that MassMutual arguably required agents to fill in the doctor's reports as Wolford had, MassMutual then asserted that Wolford's additions were incorrect. Again, MassMutual was wrong; the doctor later confirmed Wolford's additions. After King's resistance and request for further investigation, the FPC further investigated the allegations.

In June 1997, MassMutual's FPC told King and Wolford that the investigation had uncovered that the miners were ineligible, and accused Wolford of insurance fraud. (Litigation discovery later proved MassMutual's investigation uncovered that the miners were in fact eligible for

the policies.). Wolford's request for specifics was rebuffed by MassMutual. On June 6, King told Wolford that he might face legal actions for fraud, resulting in heavy monetary liability and possible jail time. On July 8, 1997, MassMutual again directed King to terminate Wolford.

On July 13, 1997, King instead opted to telephone Wolford, informing him that he might be terminated soon and advising Wolford to resign and take a broker contract with MassMutual. King suggested that if Wolford was fired he would have trouble getting another job with a premium insurance agency and that by taking the broker contract Wolford would continue to receive his non-vested renewal and persistency commissions. Wolford resigned and signed the broker contract the next day. The broker contract was signed and approved by MassMutual on August 4, 1997. On September 22, 1997, pursuant to MassMutual's direction, King terminated the broker contract.

PROCEDURAL BACKGROUND

Wolford filed suit alleging (1) MassMutual tortiously interfered with his contract with King; and (2) MassMutual made, through its Agent King, intentional misrepresenttations that induced him to resign his career contract. MassMutual filed a counterclaim against Wolford.

At trial, the jury found that MassMutual (1) was a party to both Wolford's career and broker contracts with King; and (2) made intentional misrepresentations to Wolford to induce him to resign his career contract with King. It granted $1.9 million in compensatory damages and $54.9 million in punitive damages, and rejected MassMutual's counterclaims.

MassMutual, pursuant to Fed.R.Civ.P. 50 and 59, requested that the district court enter judgment dismissing Wolford's claim or, in the alternative, grant a new trial or a remittitur. MassMutual also moved, pursuant to Rules 58, 59(e), and 60, to amend, correct, and/or vacate the district court's judgment. The district court rejected all of MassMutual's post-trial motions, but it eventually remitted the punitive damages to $7.6 million.

During the pendency of this first appeal (No. 01-5694), MassMutual discovered allegedly new evidence. After the verdict in Wolford's favor, King instituted an action against MassMutual for, *inter alia*, tortious interference with his contract with Wolford. MassMutual learned that King had recorded the telephone conversation between Wolford and King regarding Wolford's resignation. Wolford was not aware that King had recorded the conversation.

MassMutual moved for relief from judgment in the instant case (No. 01-5694). Premised upon Rule 60(b)(2), MassMutual argued that the audiotape recording was newly discovered evidence which contradicted both Wolford's and King's trial testimony in the Wolford litigation and would have likely altered the outcome of the case. Furthermore, pursuant to Fed.R.Civ.P. 60(b)(3), MassMutual alleged that King and Wolford concealed the recording and provided false testimony. Finally, MassMutual maintained that it was entitled to relief under the catch-all provision, Fed.R.Civ.P. 60(b)(6).

The district court denied all of MassMutual's motions under Rule 60(b). Although finding MassMutual exercised due diligence in obtaining the recording, the district court ruled that MassMutual failed to demonstrate that the recording was material evidence that would have clearly produced a different result at trial. As the recording did not constitute newly discovered evidence, MassMutual had no other recourse under Rule 60(b). This second appeal (No. 02-6336) followed, and was consolidated with the first appeal.

DISCUSSION

Sufficiency of the Evidence

The jury found that MassMutual fraudulently induced Wolford to resign his career contract. In a diversity case, this court reviews a Rule 50 sufficiency of the evidence claim under the forum state's standard of review. *See K & T Enters., Inc. v. Zurich Ins. Co.*, 97 F.3d 171, 176 (6th Cir.1996). Under Tennessee law, when ruling on a Rule

50 motion, "the trial court should consider all evidence introduced by the non-moving party, draw all reasonable inferences from that evidence, disregard all countervailing evidence and, if there is any competent evidence about which reasonable minds could differ, the trial court should overrule the motion." *Harrogate Corp. v. Sys. Sales Corp.*, 915 S.W.2d 812, 817 (Tenn.Ct.App.1995) (citation omitted).

Fraud in Tennessee requires proof of: (1) an intentional misrepresentation of material fact, (2) involving a past or existing fact (or promise of future action with no present intent to perform), (3) knowledge of the representation's falsity, and (4) an injury caused by reasonable reliance on the representation. *Shah v. Racetrac Petroleum Co.*, 338 F.3d 557, 566-567 (6th Cir.2003). Without belaboring the other elements, any fraud by MassMutual did not injure Wolford.

Interestingly, Wolford did not initially lose his commissions by resigning. If King had not terminated the broker contract, Wolford would have continued to receive all his commissions, including the non-vested. (J.A. 01-5694, at 945.) It was only after King, at MassMutual's direction, terminated the broker contract that Wolford lost his non-vested commissions. However, Wolford had no actionable claim for the loss of this contract against MassMutual. He cannot bring a wrongful termination claim against MassMutual because King was the only party with the direct power to fire Wolford.[1] Since MassMutual, even though it was a party, did not have the direct power to terminate Wolford, any claim regarding the loss of his broker contract would be a tortious interference claim

---

[1] Because both the career and broker contracts between Wolford and King were "at-will," King cannot be held liable for the termination under Tennessee's strict "at-will" contract doctrine. *See Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 716 (Tenn.1997) (An at-will contract may be terminated by either party "for good cause, bad cause, or no cause at all without being guilty of legal wrong."). If Agent King cannot be liable, then any vicarious/agency type claim against MassMutual must fail.

against MassMutual. Generally, under Tennessee law, a party cannot tortiously interfere with its own contract. *See Purisch v. Tenn. Technological Univ.*, 76 F.3d 1414, 1420 (6th Cir.1996) ("A party to a contract cannot be held liable for procuring the breach of that contract."); *Forrester v. Stockstill*, 869 S.W.2d 328, 331 (Tenn.1994) (finding claim for wrongful interference by a third person actionable only if that person stood as third party to the employment relationship). Since the jury found that MassMutual was a party to the career and broker contracts, the district court dismissed the procurement/interference claim, and the parties have not appealed that issue.

Since Wolford cannot claim tortious interference or wrongful termination, the only fraud claim Wolford could assert is wrongful inducement to resign. Normally, this claim is brought when one employer uses a misrepresentation about duration, benefits, or financial strength to lure an employee from a job with another employer. When the employee has no breach of contract or wrongful termination action, courts have allowed the employee to assert a fraudulent inducement claim for the loss of the former job. The damage is the loss of pay or benefits. While Tennessee does not have any law directly on point, other state courts have allowed this type of fraud claim. *See, e.g., Liggett Group, Inc. v. Sunas*, 113 N.C.App. 19, 437 S.E.2d 674, 681 (1993); *Berger v. Sec. Pac. Info. Sys.*, 795 P.2d 1380, 1384 (Colo.Ct.App.1990) (relied on by the district court); *Sea-Land Serv. v. O'Neal*, 224 Va. 343, 297 S.E.2d 647, 651-53 (1982). We assume without deciding that the Tennessee Supreme Court would also allow this type of fraud claim.

Wolford claimed damages of non-vested renewal commissions, fringe benefits, office expenses, pension benefits, and income from continued sales, things that he forfeited when he resigned – and things he would have lost had he been terminated. The evidence showed that if Wolford did not resign, King would have lawfully terminated him. At all times, both Wolford and King maintained that Wolford resigned specifically to avoid termination. King's

uncontroverted testimony stated that he would have fired Wolford had he not resigned.[2] (JA, 01-5694, at 1049-50.) Moreover, and most injurious to Wolford, King eventually terminated the broker contract at MassMutual's direction. (JA, 01-5694, at 473-74.)

The damages for fraud are calculated by placing the injured party in the same position he would have occupied had the fraud not occurred. *Shahrdar v. Global Housing, Inc.*, 983 S.W.2d 230, 238 (Tenn.Ct.App.1998). Here, had the fraud not occurred, Wolford would not have resigned but King would have fired him, leaving Wolford in exactly the same position he is in now – that is, without the non-vested commissions or other damages he claims.

Thus, we REVERSE the lower court's finding that there was sufficient evidence to find MassMutual liable for fraud because MassMutual's misrepresentations caused Wolford no injury. Consequently, since fraud was the only claim the jury returned in favor of Wolford, the punitive damages naturally must be dismissed, and there is no need to discuss any of MassMutual's remaining assignments of error.

REVERSED.

---

[2] KING: ". . . I had planned if I did not receive an acceptance letter of his resignation I planned to go to Kingsport and . . . go through the termination process. Since I had received his letter of acceptance I didn't need to travel to Kingsport to do the termination."

Wolford argues that King testified that he would not have fired Wolford without a reason, but this testimony was only referring to MassMutual's initial request. (JA, 01-5694, at 1087-88).

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

No. 3:98-CV-110 (Phillips)

LEON WOLFORD,
Plaintiff/Counter-Defendant,

v.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
MML PENSION INSURANCE COMPANY AND
C.M. LIFE INSURANCE COMPANY,
Defendants/Counter-Plaintiffs.

[Filed Apr. 23, 2001]

MEMORANDUM AND ORDER

Plaintiff Leon Wolford sued defendants for procurement of breach of contract and for intentional misrepresentation. The case was tried to a jury which found in favor of Wolford and awarded plaintiff compensatory damages of $1.9 Million Dollars and punitive damages of $54.9 Million Dollars on plaintiff's claim of intentional misrepresentation. The court suggested a remittitur of the punitive damages award to $7.6 Million Dollars. Defendants have moved the court for judgment N.O.V. or in the alternative for new trial or remittitur. Wolford has moved the court to modify and amend its suggestion of remittitur.

Background

Plaintiff Leon Wolford brought suit against defendants Massachusetts Mutual Life Insurance Company (Mass-

Mutual), MML Pension Insurance Company, and C.M. Life Insurance Company for procuring a of [*sic*] breach of his contracts with General Agent Tom King, and for committing a fraud upon him by inducing him to resign his position as a career agent with defendants upon the expectance that he would receive broker contracts with defendants.

Leon Wolford served for more than 20 years as a career agent under written contracts with various general agents for MassMutual. On January 1, 1990, Wolford entered career contracts with Tom King, general agent for defendants in the Tennessee Valley area. The career contracts were by their terms terminable at will.

Wolford sold insurance packages to coal mining companies as substitutions for workers' compensation benefits. Plaintiff would compile packages of insurance intended to approximate workers' compensation benefits including medical benefits, life insurance plans, and disability benefits. The disability and pension insurance plans sold by plaintiff in these packages were policies of insurance extended by defendants.

Defendants assert that their standards for selling disability insurance policies state that agents are prohibited from selling disability policies to employees or owners of coal mines who worked more than six or eight hours underground in a week. This underwriting limitation was imposed due to the unique hazards inherent in deep coal mining. In performing an investigation of disability claims, defendants alleged that they determined a large percentage of the disability insurance sold by plaintiff did not meet their underwriting requirements for disability policies.

Defendants advised Tom King, their general agent, that Wolford was not authorized to continue acting as a subagent in selling defendants' products. King was instructed by letter dated July 8, 1997 from defendants, to

terminate his contracts with Wolford. Tom King, who only sells products of defendants, advised Wolford of defendants' position. Wolford then sent a resignation letter to Tom King on July 13, 1997.

On July 14, 1997, Tom King issued broker contracts to Wolford. The broker contracts included a broker contract with Massachusetts Mutual Life Insurance, a broker contract with C.M. Life Insurance Company, and a broker contract with MML Bay State Life Insurance Company. The broker contracts with Massachusetts Mutual Life and C.M. Life were approved and accepted by defendants. On September 4, 1997, defendants notified Tom King that Wolford did not have authority to act as a broker on behalf of defendants. On September 22, 1997, Tom King notified Wolford that the broker contracts were being terminated.

Wolford filed suit against defendants for breach of contract and intentional misrepresentation on February 5, 1998.

Defendants flied a counterclaim against Wolford alleging he intentionally or negligently made misrepresentations to defendants as to the applications for disability insurance and other information upon which defendants relied in issuing insurance to applicants which enhanced defendants' risk of loss. Defendants asserted they incurred damages as the result of paying insurance claims to coal miners. Defendants sued Wolford asserting he breached his duty as an agent or sub-agent in violation of his career agent's contract and in violation of his common law duties. Defendants further asserted claims for intentional misrepresentation, negligent misrepresentation, fraud and deceit.

This case was tried to a jury on May 3, 4, 5, 8, 9, 10 and 11, 2000, and the jury returned a verdict for Wolford against defendant Massachusetts Mutual Life Insurance Company, and awarded Wolford damages in the amount

of $1.9 Million Dollars. The jury found that Wolford established by a preponderance of the evidence that defendant Massachusetts Mutual Life Insurance Company made intentional misrepresentations to him to induce him to resign his career contracts with General Agent Tom King. The jury further found that Wolford was damaged as a proximate result of defendant Massachusetts Mutual Life Insurance Company's intentional misrepresentations to him. The jury found defendant Massachusetts Mutual Life Insurance Company 100% liable for Wolford's claims, and found no liability on the part of defendants, MML Pension Insurance Company and C.M. Life Insurance Company on Wolford's claims. Additionally, the jury found in favor of Wolford on defendants' counterclaims. The jury also found by clear and convincing evidence that defendant Massachusetts Mutual Life Insurance Company had acted intentionally, recklessly, maliciously, or fraudulently, and that Wolford was entitled to punitive damages [Doc. 109]. After a hearing on the amount of punitive damages on May 25, 2000, the jury awarded Wolford punitive damages of $54.9 Million Dollars [Doc. 114].

By memorandum and order entered August 1, 2000, the court reviewed the jury's verdict and directed the clerk to correct the judgment in this case as follows: (1) to enter judgment in favor of plaintiff against defendant Massachusetts Mutual Life Insurance Company in the amount of $1.9 Million Dollars compensatory damages, and that plaintiff recover nothing from defendants MML Pension Insurance Company and C.M. Life Insurance Company; (2) to enter judgment in favor of plaintiff against defendant Massachusetts Mutual Life Insurance Company in the amount of $54.9 Million Dollars punitive damages; (3) that plaintiff recover the costs of the action; and (4) to enter judgment in favor of plaintiff on defendants' counterclaims. In addition, the court suggested a remittitur of $47.3 Million Dollars of the punitive damages award, for a

remaining punitive damages award of $7.6 Million Dollars [Doc. 134].

Standard of Review

Defendant, Massachusetts Mutual Life Insurance Company (MassMutual), has moved the court to enter judgment as a matter of law, or, in the alternative, for a new trial or remittimr. Wolford has moved the court to modify and amend its suggestion of remittitur.

Jurisdiction in this case is based upon diversity of citizenship and the amount in controversy. 28 U.S.C. § 1332. The Sixth Circuit Court of Appeals has ruled that a federal court sitting in diversity reviews de nevo legal determinations raised by a motion under Rule 50, Federal Rules of Civil Procedure, and must apply the forum state's standard of review "only when a Rule 50 challenge is mounted to the sufficiency of the evidence supporting a jury's findings. No deference is appropriate in diversity cases to a trial court's resolution of legal issues." *K & T Enterprises, Inc. v. Zurich Ins. Co.*, 97 F.3d 171, 176 (6th Cir. 1996).

Since MassMutual's Rule 50 motion is clearly based on a challenge to the sufficiency of the evidence supporting the jury's verdict, the court must look to the law of Tennessee to determine the standard under which defendant's motion is to be reviewed. Tennessee law requires that a motion for judgment as a matter of law be granted only if the court, after construing the evidence most strongly in favor of the non-movant and discarding all countervailing evidence, determines that reasonable minds could not differ as to the conclusions to be drawn from the evidence. "If there is any doubt as to the proper conclusion to be drawn from the evidence, the motion must be denied." *Eaton v. McLain*, 891 S.W.2d 587, 590 (Tenn. 1994); *Werthen Bag Corp. v. Agnew*, 202 F.2d 110, 122-23 (6th Cir. 1953).

The Sixth Circuit has further ruled that a motion for new trial seeking a remittitur of a jury's verdict should be granted only if the award clearly exceeds the maximum amount which a jury could reasonably find to be compensatory for the plaintiff's loss. *Roush v. KFC Nat'l Management Co.*, Tenn. F.3d 392, 397 (6th Cir. 1993), *cert. denied*, 115 S. Ct. 56 (1994). "Unless the award is (1) beyond the range supportable by proof or (2) so excessive as to shock the conscience, . . . or (3) the result of a mistake, we must let the award stand." *Leila Hosp. and Health Ctr. v. Xonics Medical Sys., Inc.*, 948 F.2d 271, 278 (6th Cir. 1991). In diversity cases, the trial court must apply the "damage-control standard state law supplies," subject to federal appellate review for abuse of discretion. *Gasperini v. Center For Humanities, Inc.*, 518 U.S. 415 (1996). In *Gasperini*, New York statutory law required a determination that an award was excessive if it "deviates materially from what would be reasonable compensation." Concluding that this standard required closer court review than the traditional "shock the conscience" test, the Supreme Court held that Erie principles required application of the New York standard, which was arguably part of the procedural statute, because to hold otherwise could result in larger recoveries in federal court than those which a state court could entertain. *Gasperini v. Center For Humanities, Inc.*, 518 U.S. at 428-29; *Tatum v. Land*, 1997 WL 85144 (6th Cir. 1997) (unpublished opinion).

As stated by Judge Murrian in the recent decision of *Bivens v. Black*, 35 F. Supp.2d 607 (E.D. Tenn. 1999), the real importance of the Gasperini decision lies in its practical implications for the federal court system, in that the court announced new standards of review for new trial motions on excessiveness grounds in federal court. Under Tennessee substantive law, "the power of a trial judge to disturb a verdict because of his dissatisfaction with the amount of damages rest . . . on more than a century of precedent and practice." *Bivens v. Black, supra* at 609

(quoting *Foster v. Amcon Intern. Inc.*, 621 S.W.2d 142, 144 (Tenn. 1981)). It has been traditionally the standard in federal court in Tennessee, Judge Murrian observed, that it is the duty of a trial judge to set aside a verdict and grant a new trial if the judge is of the opinion that the verdict is against the great weight of the evidence or if a miscarriage would result if a new trial was not granted. *Bivens v. Black, supra* at 611 (*citing Turner v. United States*, 139 F. Supp. 30 (E.D. Tenn. 1954)), *aff'd* 229 F.2d 944 (6th Cir.), *cert. denied*, 351 U.S. 970 (1956), and *Sandlin v. Pearsall*, 427 F. Supp. 494 (E.D. Tenn. 1976).

Judge Murrian further observed that the Sixth Circuit Court of Appeals has spoken to the application of state law to diversity cases in regard to post-trial motions in *Tatum v. Land*, 1997 WL 85144 (6th Cir. 1997) (unpublished opinion). The Sixth Circuit has recently addressed these issues in the unreported decision of *Arch Trims, Inc. v. W. W. Grainger, Inc.*, 1998 WL 279376 (6th Cir. 1998) (unpublished case) wherein the Sixth Circuit reversed the trial court for granting defendant's motion for judgment as a matter of law because the trial court did not construe the evidence in a manner most favorable to the non-moving party. The Sixth Circuit further ruled that the court erred when it conditionally granted defendant's motion for a new trial because the verdict was contrary to the weight of the evidence. The Sixth Circuit held that after reviewing the evidence, the Appellate Court had to conclude that the district court's substitution of its reassessment of the evidence for that of the jury constituted an abuse of discretion. Thus, the case was remanded with instructions to enter judgment on the jury's verdict. *Arch Trims, Inc. v. W. W. Grainger, Inc., supra* at 10-11.

Under § 20-10-102(a), Tenn. Code Ann., a trial court in Tennessee, when a motion for a new trial has been filed, may suggest a remittitur when the trial judge is of the opinion that the verdict in favor of a party should be reduced. The statute also stipulates that in case the party

in whose favor the verdict has been rendered refuses to make the remittitur upon penalty of a new trial being awarded, the party in whose favor such verdict has been rendered may make the suggested remittitur under protest, and appeal from the action of the trial judge to the Court of Appeals. However, that is not the case in federal courts. In *Donavan v. Penn Shipping Co., Inc.*, 429 U.S. 648 (1977), the Supreme Court reaffirmed "the long-standing rule that a plaintiff in federal court, whether prosecuting a state or federal cause of action, may not appeal from a remittitur order he has accepted." *Id.* at 649. Thus, under *Donavan*, a plaintiff who accepts a remittitur, consents to the amended judgment and the vacating of the judgment on the verdict, and waives his right to appeal the remittitur order.

Evidence Presented at Trial

The evidence established that MassMutual is engaged in the insurance business. Wolford serwd for more than 20 years as a career agent under written contracts with various general agents for MassMutual. Wolford's last such contract was with Tom King, who was under a general agent contract with MassMutual. Wolford's contract with King, prepared by MassMutual, was designated as a "career contract." The parties to the contract were listed as Wolford and Tom King. MassMutual also signed the contract, expressing its approval and guaranteeing payment of commissions due and payable by King to Wolford in the event King was no longer general agent.

For more than 20 years, MassMutual issued policies on applications submitted by Wolford. In 1990 and 1991, MassMutual decided to accept applications from coal mine managers who worked underground no more than six to eight hours per week. Grant Norman, one such insured, was a superintendent and vice-president of Husky Mining Company.

In November 1996, Norman made a claim under his policy. In order to process the claim, MassMutual instructed Wolford to have Norman's family physician, Dr. Vellayan, complete an Attending Physican's Statement (APS). Dr. Vellayan only partially completed the form; he returned it to Norman and asked him to obtain certain information requested by the APS which he did not have directly available.

Norman contacted his employer's personnel manager and asked her for help with the paperwork. She arranged a meeting between Norman and Wolford at which Wolford was to assist in completing the APS form. Wolford reviewed the APS and noticed some unanswered questions. For example, to designate the projected period of disability, the form provided three boxes: "within 3 months," "within six months," or "longer." Dr. Vellayan checked "longer." The form also stated "explain" if "longer" were selected. Dr. Vellayan provided no explanation. According to Ms. Hurley and Wolford, Norman told them the doctor stated he could be disabled from working for up to two years. Norman recalled that he asked Wolford and Ms. Hurley to help him fill out the forms, and that it was possible he discussed his period of disability. Based on what Norman told him, Wolford added "maybe two years" to the APS box labeled "explain." Wolford also noticed other information on the Norman APS was left blank, filled in this information, then mailed the claim forms and APS to MassMutual's home offices.

A MassMutual claims representative who reviewed Norman's APS testified she determined the handwriting on the form was in two different types and the wording "maybe 2 years" was not customary language for physicians; she thus concluded that information had been added to the APS. She requested Dr. Vellayan's office provide its own copy of the Norman APS. That copy showed the incomplete answers to some questions.

The claims representative also contacted Norman, who explained that he had requested help with the claim forms from Wolford because he (Norman) did not "read or write too good." Norman also told her he was disabled from working, had no income, and requested she inform his bank as to when his disability payment would be forthcoming, to prevent his vehicle from being repossessed. Wolford testified he was aware of Norman's financial situation when he requested help completing the forms.

MassMutual's Vice-President Winter notified King about the questions regarding Norman's APS form. King contacted Wolford, who immediately told him he had supplied the information on the APS, and had done so to prevent a delay in processing Norman's claim. Wolford and King both advised MassMutual about the circumstances under which the forms had been completed and King specifically told MassMutual that Wolford had done exactly as he had been trained and advised to do by both King and MassMutual. MassMutual characterized the APS as analogous to insurance applications and "related documents." With respect to such applications and "related documents," MassMutual had instructed its agents to supply complete information if known. MassMutual admitted that its written instructions required the agent to complete requested medical information left incomplete.

By November 1996, MassMutual had received four or five claims by other clients of Wolford and became concerned about the "flurry" of claims. MassMutual's Senior Vice-President Foresi testified the first thing he heard about any concerns with Wolford was that there had been a number of claims. Tom King testified he first became aware of the concern about the claims in a November 1996, phone conversation with MassMutual's home office.

On March 18, 1997, MassMutual requested that King terminate his contract with Wolford. MassMutual's

expressed reason for requesting the termination was the Norman APS. Later that month, King traveled to MassMutual's home offices and met with a sub-group of MassMutual's Field Practices Committee (Field Practices). King explained that career agents were trained to complete answers as to medical information on claim forms and APS's, and that Wolford had not been trained to use explanatory cover letters in such situations. King had been MassMutual's general agent for 12 years and Norman's APS was the "only time I ever knew that an agent was not supposed to help a client fill out a claim form." King testified:

> . . . Again, that was a first time I had ever been made privy that you could get in trouble for adding information over a physician's signature, again because the Company has documents that told us to do that. I think you [referring to MassMutual] have them.
>
> Q. Can you identity the documents?
>
> A. They are in the form of e-mails. There is [sic] underwriters that confirmed that say you can do that. There are several office managers from around the country. We e-mailed a question out and said we need some help here. We are being told to do, when there is blank information left off of an Attending Physician's Statement we don't know what to do about it. In the past we have been told to just write it in. We got e-mails back that said, yes, that is what we do. That is what we have been trained to do. We got e-mails from people in the field that are in offices in the field. We got e-mails from even underwriters in the Home Office.

King also testified that he showed MassMutual the relevant e-mails from other general agents of MassMutual.

MassMutual's Vice President Gray inquired of Associate General Counsel Campbell whether MassMutual should change its written instructions requiring agents to complete incomplete forms. Campbell agreed the Wolford matter had probably drawn Gray's attention to these instructions and admitted he had searched in vain for a rule which restricted agents from completing APS forms.

MassMutual told King in March 1997, that Wolford had presented "incorrect information" about Norman's injury and about his job title. Norman, however, had confirmed to MassMutual's claim representative that he was a vice-president and superintendent for Husky Mining. Dr. Vellayan confirmed in writing to MassMutual's investigator that the information added to the APS was correct. Dr. Vellayan testified the information was correct, that he knew, even before Norman's neck surgery (which predated the APS), that Norman would never go back to work (which, Dr. Vellayan also testified, he told to Norman).

Various members of the Field Practices Committee continued to assert the information Wolford added to the APS form was incorrect. These members, who played central roles in the investigation of Wolford's conduct, included a senior vice-president, vice-presidents and associate general counsel. After King refused MassMutual's initial instruction to terminate Wolford's career contract, MassMutual suspended its instruction.

By the time King refused to terminate Wolford, MassMutual had prepared a "Report for the Division of Insurance Fraud Investigation Kentucky Department of Insurance" accusing Wolford of fraud. MassMutual never filed the report with the state. Also by this time, MassMutual's most experienced investigator had been instructed to visit Kentucky and get a signed statement from Dr. Vellayan about the information Wolford had

added to the APS. Dr. Vellayan confirmed that the information Wolford had added was correct.

MassMutual informed neither King nor Wolford of Dr. Vellayan's signed statement until it was obtained via formal discovery. MassMutual's Associate General Counsel Campbell testified the information Wolford added to the APS was inaccurate and misled MassMutual, despite Dr. Vellayan's and Norman's testimony to the contrary and Dr. Vellayan's statement the information Wolford added was correct. MassMutual initially claimed the Norman APS was its sole basis for instructing King to termimte his contract with Wolford.

Prior to investigating Wolford, MassMutual had full knowledge of Wolford's business model and marketing methods, which included providing disability and life insurance policies issued by MassMutual and providing health insurance policies issued by other companies. The insurance package provided coal company managers with coverage in lieu of state-sponsored worker's compensation. At its inception, MassMutual's Vice-President Foresi worked directly with Wolford and approved the package, believing it would be good for both MassMutual and miners.

As soon as MassMutual was called upon to make payments under those policies, MassMutual reconsidered insuring coal mine managers and concluded that the package had turned out to not be so good for MassMutual. Foresi admitted, according to the Field Practices chairman, that underwriting miners turned out to be a mistake. Wolford testified two of MassMutual's executives stated after the claims began that "coal miners were not good risks." Notwithstanding Foresi's knowledge and direct experience with Wolford, Foresi was not selected to participate in any of the face-to-face discussions with King or with Wolford concerning MassMutual's charges against

Wolford. In fact, Foresi was never even made aware such meetings occurred.

MassMutual's initial field investigation of Wolford was conducted by Investigator Joiner. Joiner, rather than telling Wolford the true reason for their meeting, told Wolford to take him around to meet with Wolford's Kentucky clients so that Joiner could "see how a top producer does it." MassMutual then assigned their most experienced investigator, Hunady, to the case. Hunady and Joiner interviewed over 30 people about Wolford, yet took no written statements other than from Dr. Vellayan, and made no tape recordings or videos.

On June 5, 1997, King requested the specifics as to names, incidents, etc., from those interviewed by MassMutual, but received no reply. King then wrote MassMutual on June 17, 1997, stating in part:

> I continue to be disturbed by what appears to be conflicting information regarding the Leon Wolford situation. Because Leon and I are not being made aware of the information developed by the investigators, it is impossible for Leon to defend himself . . . , one individual has overheard most of Leon's enrollments, the statements he makes, and the questions he asks. And, he can confirm that Leon never tells people to lie on the application to get coverage. If these people truly are in management, . . . then it seems Leon is being unreasonably accused . . . . Because he has not been provided any hard information to defend, he is essentially trying to defend himself against "ghosts." And every time he or I communicate something, Denis [Hunady] or someone indicates "that just isn't so" . . . .

On June 18, 1997, MassMutual again refused to furnish particulars of its investigation.

After Hunady returned from his investigation in Kentucky, Wolford and King had separate meetings on June 25, 1997 with another Field Practices sub-group, including Hunady. Both were told that 10-12 people interviewed by Hunady had reported they had successfully applied for disability insurance, but did not meet MassMutual's requirements concerning time underground and management duties, and that Wolford had known they were unqualified.

On the basis of Hunady's undocumented reports, MassMutual's executives and Hunady determined that Wolford was guilty of deliberate insurance fraud. Wolford testified he was asked questions about various disability claims, and was told that in six or eight cases, information on the applications did not match the information MassMutual had collected in its investigation. King and Wolford requested the names of the miners MassMutual claimed had made these allegations against Wolford, but MassMutual refused their requests. Hunady admitted he did not give Wolford or King specific names. Following the meetings with MassMutual, King, while riding to the airport, told Wolford, in effect, if the allegations were true there was no chance for Wolford to keep his contract with him.

MassMutual's claims representative testified that nine miners had filed insurance claims. The claims totaled approximately $1,133,000. Associate General Counsel Campbell testified that MassMutual deemed that Wolford had submitted nine false applications. Moreover, MassMutual issued subpoenas for depositions of nine miners, substantially the same as those identified by the claims representative. MassMutual took video depositions from five of the nine; all five confirmed that Wolford had explained the underwriting rules to them, that they qualified, and that the information contained in their applications was accurate. This testimony showed there were no

misrepresentations by Wolford on the applications. MassMutual canceled the remaining four depositions.

All five of the deposed claimant-miners confirmed they were qualified for the disability insurance: Norman testified he was vice-president of production and spent 5-10% of his time underground; Robinson explained he was superintendent and vice-president of production, and made only two to three trips per week underground, each requiring 30-45 minutes; Hunt, supervisor of an above-ground maintenance shop, testified he worked underground approximately eight hours per week; Marcum testified he was a superintendent and that it was largely unnecessary for him to go underground; Fritz confirmed he was a superintendent, had been promoted to vice-president, and that Wolford had explained time underground could not be more than 20%.

Wolford testified that MassMutual's purpose for inducing him to resign his career contracts was to deprive him of commissions he had accumulated through the years, designated by MassMutual as non-vested, renewal and persistency commissions, which were not payable to Wolford if his contract with King were terminated. MassMutual advised Wolford that the value of his non-vested, persistency and renewal commissions as of December 1995, was $746,185. As of July 1997, that figure had increased to approximately $1 Million. Hunady testified he received instructions from MassMutual's executive vice-president to determine Wolford's total commissions, including those in the future, though no reason was given for the investigation.

On June 6, 1997, King told Wolford that unless Wolford could answer the questions raised by MassMutual's investigation, Wolford might face legal actions for fraud which could possibly result in the loss of his insurance and securities licenses, liability for millions of dollars in damages, and possible jail time. On July 8, 1997, Vice-President

Winter sent a final demand that King terminate his career contract with Wolford. On July 13, 1997, King telephoned Wolford and told him "it was coming down." If terminated, Wolford would never have been able to represent another top-tier insurance company. Thus, King suggested Wolford resign from his contract and enter a broker contract with King. In this way, Wolford could continue serving his clients and thereby receive his renewal and persistency commissions. Both Wolford and King testified that King did not expressly inform Wolford of Winter's letter demanding Wolford's termination.

In fact, King testified he had discussions with various executives of MassMutual between July 7 and 13, and, based on what they told him, Wolford would keep his commissions if he resigned and transferred to a broker contract. Broker contracts were entered between King and Wolford on July 14, 1997; and were approved and signed by MassMutual and C.M. Life on August 4, 1997. Then, on September 22, 1997 King terminated the broker contracts per MassMutual's order. King stated he was told by MassMutual's Senior Vice-President Pugh the reason MassMutual wanted to terminate Wolford was the "liability he [Wolford] created for the home office."

Wolford testified that, in his opinion, MassMutual directed King to fire him because MassMutual "wanted my renewals and persistency fees. They wanted my money." MassMutual's senior vice-president admitted to King that the reason MassMutual wanted Wolford's contract terminated was because of the liability created for the company by the miners' claims. Wolford testified it was his belief that MassMutual made a business decision to offset the claims: "I had a lot of renewals and commissions coming to me. It was business decision to take the money."

Post-Trial Motions

Defendant, Massachusetts Mutual Life Insurance Company, pursuant to Rules 50 and 59 of the Federal Rules of

Civil Procedure, has now moved the court to enter judgment as a matter of law, or, in the alternative, for a new trial or remittitur. As grounds for its motion, MassMutual asserts:

1. MassMutual's verdict on the tortious procurement claim bars any claim based on wrongful termination.

2. Wolford's claim for intentional misrepresentation should be dismissed as a matter of law.

3. Wolford suffered no damages as a result of the alleged misrepresentation because his contracts were terminable at will.

4. MassMutual properly terminated Wolford's contract.

5. Wolford's claim for intentional misrepresentation in the termination of his contract is inconsistent wtth Tennessee's "employment at will" doctrine.

6. Wolford's claim for future potential commissions constitutes a claim for interference with future economic advantage, a cause of action which has been expressly rejected by the Tennessee Supreme Court.

7. Wolford's claim for future potential commissions is impermissibly speculative.

8. The court did not clearly instruct the jury that in order to award punitive damages, the jury must also find by clear and convincing evidence that MassMutual acted intentionally, recklessly, maliciously, or fraudulently.

9. The evidence failed to show that MassMutual acted intentionally, recklessly, maliciously, or fraudulently, or was in any way guilty of miscon-

duct which could result in an award of punitive damages.

10. Tom King was not a principal of MassMutual who as a matter of law could subject MassMutual to punitive damages.

11. The verdict was the result of passion, prejudice, and caprice.

12. The verdict was against the great weight of the evidence.

13. The compensatory and punitive damages awarded are excessive and should be reduced or a remittitur should be suggested.

14. The imposition of punitive damages violates the Due Process Clause of the Fifth and Fourteenth Amendments.

15. Wolford's evidence and argument in the bifurcated punitive damage proceeding greatly exceeded the scope of the "intentional misrepresentation" verdict rendered by the jury.

16. The court erred in prohibiting the introduction of the field investigation notes and interviews conducted by MassMutual's investigators.

17. The court erred in allowing Wolford to introduce the substance of field investigation notes and interviews conducted by MassMutual's investigators.

18. The evidence demonstrates that defendants established all elements of their counterclaims by a preponderance of the evidence and accordingly a judgment as to the counterclaims shoud be entered on their behalf.

19. The jury did not find liability for damages on the part of either MML Pension Insurance Company or C.M. Life Insurance Company.

[Docs. 122, 123]

The Jury's Verdict is Not Inconsistent

MassMutual argues that the jury's verdict is inconsistent and should be set aside. I do not find that the jury's verdict was inconsistent. MassMutual was found by the jury to be a party to Wolford's contract with King. Wolford, therefore, did not prevail on his procurement of breach of contract claims. Thus, MassMutual claims Wolford could not, as a matter of law, recover against it on his fraud claim, or on any other tort claim. MassMutual's argument is contrary to the evidence as to whether MassMutual had the right or power to terminate Wolford's contract with King.

The jury determined MassMutual to be a party to Wolford's career contract with King. Thus, there were three parties to that contract: King, Wolford and MassMutual. However, the power of termination did not rest with MassMutual. The career contract identifies only Wolford and King as the parties to the contract and then states that "[t]his contract shall terminate on the date of written notice of termination by either party to the other party . . . ." MassMutual's senior officers, DeLisio and Winter, who are also trained lawyers, testified MassMutual had no power to terminate Wolford's contract. King and Wolford likewise so testified. MassMutual's Vice-President Pugh admitted that MassMutual intended in the future to modify its contract forms to provide MassMutual with the power to terminate the contract "as opposed to going through the general agent." MassMutual's general counsel Campbell testified MassMutual was not even a party to Wolford's contract.

King's general agent contract with MassMutual regarding King's power to employ his own agents states in part:

> Authority – (a) The General Agent may contract with agents for the solicitation of applications for business and with brokers for the submission of applications for business. All contracts made by the General Agent with such persons shall be made upon forms furnished by the Company and executed by the General Agent individually and without the use of his title General Agent. Such contracts and any amendments thereto shall be executed in triplicate and all copies forwarded to the Company for approval and endorsement. The Company shall be immediately notified in writing when any contract is terminated.
>
> (b) The General Agent and agents under contract with him are authorized to solicit and secure applications for business. The General Agent is authorized to accept applications for business from brokers under contract with him. All such applications including all medical examiners' reports shall be forwarded promptly to the Company. The General Agent and agents under contract with him may determine the time, place, and manner of soliciting applications and the persons solicited.

The references to King, as general agent, contracting with agents, makes clear that MassMutual did not regard itself as an equal party with King under the career contract. This is supported by the fact King was required to enter the career and broker contracts "individually rather than as an agent." *See Holt v. American Progressive Life Ins. Co.*, 731 S.W.2d 923, 925 (Tenn.App. 1987); *Hammered v. Herbert Hood Co.*, 221 S.W.2d 98, 102-03 (1949) (holding that despite the existence of an agency relationship, the agent alone is bound on a contract executed in connection with the agency, if the agent so intends);

Menuskin v. Williams, 940 F.Supp. 1199, 1220 n. 16 (E.D. Tenn. 1996) (approving this proposition in dicta). Moreover, if MassMutual possessed a power of termination, it would be reasonable to assume that there would be some reference to MassMutual's power to termination in either contract. The requirement of notification in the event of termination of an agent in King's contract is further support for the proposition that only King could terminate Wolford.

Paragraph 24 of the general agent's contract states: "Nothing in this contract shall be constructed as creating the relationship of employer and employee between the Company and the General Agent or between the Company and persons under contract with the General Agent." As is customary, the general agent and his agents earned commissions on the policies they procured and which were accepted by MassMutual. In this connection, King's contract again bears upon the nature of the relationship between him and Wolford and Wolford and MassMutual. Section 9 provides:

> If the Company, in its discretion, shall refund any premium on any policy issued on an application secured by the General Agent of any person under contract with him, the General Agent shall repay the Company on demand any commission and any fee received on such premium. Any commission and fee allowed under the rules of the Company on any premium not paid to the Company shall be repaid to the Company on demand. Until repaid in full, the amount of such commission and fee shall constitute an obligation of the General Agent to the Company.

In other words, if MassMutual refunded a premium on a policy procured by King's agent, King rather than King's agent, was responsible for the return of the commission. In the event MassMutual terminated King's contract, it

reserved a right to pay commissions to King's agents as follows:

> Upon termination of this contract [King's general agent contract], the Company is authorized to pay any persons under contract with the General Agent any compensation which may be due or thereafter become due in accordance with the terms of the copies of such contracts and the amendments thereto on file at the Home Office of the Company and to offset any compensation so paid against any compensation payable to the General Agent under the provisions of this contract.

The career contract between Wolford and King dovetailed neatly with the contract between King and MassMutual. Paragaph 6(b) of Wolford's career contract with King gives King a right to be repaid on demand any amount he had to pay MassMutual pursuant to his general agent's contract. Section 6(c) of Wolford's career contract provides that a change in King's compensation from MassMutual entailed a "corresponding" change in Wolford's compensation from King. Section 8(a) of the career contract gives King a right to offset against Wolford's compensation "all obligations and liabilities of the Agent to the General Agent on damages, losses, costs, and expenses which the General Agent or the Company may sustain or be liable for by reason of any act or failure on the part of the Agent." Thus, MassMutual had no direct contractual right to recovery against Wolford even if Wolford directly caused it harm.

Section 8(b) of Wolford's career contract with King contains a provision regarding MassMutual's rights if it pays compensation to King's agent after terminating King. Like the General Agent's contract, Section 12 of Wolford's career contract provides that "[n]othing in this contract shall be construed as creating the relationship of em-

ployer and employee between the General Agent and the Agent or between the Company and the Agent."

Wolford's career contract expressly states "[t]he Agent shall act for the General Agent;" it nowhere states the agent shall act for MassMutual. The contract was signed by King, as required by his general agent's contract, in his individual capacity. King's contract with Wolford contains detailed termination provisions which do not include the right of MassMutual to terminate Wolford.

The language of the contracts confirms the parties' interpretation that MassMutual had no power of termination, so long as the general agent's contract with MassMutual was in effect. MassMutual's rights, powers and duties under the career contract are set forth after the principal parties' signatures – explicitly designated in the introductory clause as King and Wolford as follows:

> COMPANY'S AGREEMENT IN CASE OF TERMINATION OF GENERAL AGENT'S CONTRACT
>
> Massachusetts Mutual Life Insurance Company hereby approves this contract and agrees that if it is terminated by reason of the termination of the contract between the General Agent and the Company, the Agent, without further notice, may continue to solicit applications for Business in the Company and submit such applications to the Company under the same terms and conditions and with the same authority and limitations of authority as are set forth in this contract. It is understood and agreed that such relationship shall continue until terminated as provided in this contract or until a contract shall go into effect between the Company and a successor General Agent. The Company further agrees that it will pay to the Agent on behalf of the General Agent any Compensation to which the Agent is entitled under this

contract after the termination of the General Agent's contract.

According to the contracts, as drawn by MassMutual, the only circumstance or condition under which MassMutual had any power or right to terminate Wolford's contract with King is as stated above. In the instant case, there was no such termination of the general agent's contract with MassMutual. Thus, no power or right of termination of Wolford's career contract ever rested with MassMutual. The condition precedent – termination of King's general agent contract with MassMutual – never was met. The caption above MassMutual's signature: "Company's Agreement in Case of Termination of General Agent's Contract," unambiguously and conditionally restricted MassMutual's powers, rights and duties, under Wolford's career contract to circumstances *after termination by MassMutual of King's general agent contract with MassMutual.* No such condition precedent occurred in this case. MassMutual thus had no power or right to terminate Wolford's contract with King. Wolford's contract with King was at-will only as between Wolford and King; not as to defendant.

MassMutual's argument that it had the right to terminate Wolford's contract merely because it signed its approval and agreement to guarantee payment of earned commissions to Wolford in the event MassMutual terminated its general agent contract with King is illogical and not supported by the evidence. All parties to the contract testified MassMutual had no right or power to terminate Wolford's contract with King. The contract itself provides no such power unless specific conditions precedent obtain, i.e., prior termination of King's general agent contract and notice to Wolford. Neither occurred. MassMutual did not present any evidence that it would have terminated King as its general agent. Nor did it present any evidence that in the event of King's termination, it would then exercise its right under the contract and terminate Wolford.

The jury's verdict is not inconsistent. "A verdict is inconsistent when a jury on a single set of facts and circumstances reaches differing conclusions of fact and law." *McCall v. Owens*, 820 S.W.2d 748, 752 (Tenn.App. 1991). Verdicts must be reconciled when possible and harmonized by viewing the case in a way that eliminates inconsistency. *See Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108, 119 (1963) (in considering jury's answers to questions in a special verdict, "it is the duty of the courts to harmonize the answers, if it is possible under a fair reading of them. . . . We therefore must attempt to reconcile the jury's finding, by exegesis if necessary, . . . before we are free to disregard the jury's special verdict and remand the case for a new trial"); *Atlantic & Gulf Stevedores, Inc., v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962) ("Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way"); *Waggoner v. Rosti*, 792 F.2d 595, 596 (6th Cir. 1986); *Milkin v. Smith*, 405 S.W.2d 668, 670 Tenn. App. 1966) (court has duty to try to reconcile incorisistent verdicts). Although the jury found MassMutual was a party to Wolford's career contract with King, MassMutual did not have the right or power to terminate Wolford as indicated by the jury's verdict of intentional misrepresentation on the part of MassMutual in inducing Wolford to resign his career contract with King. I find the jury's verdict is well supported by the evidence on this issue, and it should be affirmed.

At-Will Employment

MassMutual also asserts the jury verdict in its favor on the tortious procurement claim was a case-altering event, definitively terminating Wolford's claim that he was wrongfully deprived of his career contract. The jury's verdict that MassMutual was a party to the contracts left Wolford in an at-will relationship with MassMutual that would have been terminated had Wolford not resigned. Therefore, MassMutual argues, its actions to terminate

its at-will relationship with Wolford cannot constitute a tort.

MassMutual asserts that Tennessee law holds that where a contract is terminable at-will, no misrepresentation as to future employment can be made as a matter of law. *Lawhorn & Assoc., Inc. v. Patriot General Ins. Co.*, 917 F. Supp. 538 (E.D. Tenn. 1996); *Shelby v. Delta Air Lines*, 842 F. Supp. 999, 1015 (M.D. Tenn. 1993); *Price v. Mercury Supply Co., Inc.*, 682 S.W.2d 924, 934 (Tenn.App. 1984). Generally, a contract at-will may be terminated "at any time, for good cause, bad cause or no cause at all," without liability to the terminating party. *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 716 (Tenn. 1997); *Harney v. Meadowbrook Nursing Center*, 784 S.W.2d 921, 922 (Tenn. 1990) ("[t]he long standing rule in [Tennessee] is that an employee-at-will may be discharged without breach of contract for good cause, bad cause or no cause at all, without being thereby guilty of legal wrong"); *Whitaker v. Care-More, Inc.*, 621 S.W.2d 395, 396 (Tenn.App. 1981).

The jury verdict found that MassMutual was a party to Wolford's career contracts. MassMutual contends it had a right to direct their termination without adverse legal consequence or liability. Therefore, terminating Wolford's contracts cannot, as a matter of law, cause any injury or damage to Wolford. Damages cannot be attributed to a legal act which defendant was entitled to take, MassMutual argues.

MassMutual applies the same analysis to the broker contracts. Each contract provided that it terminated upon written notice by one of the parties to the other. Such a provision makes the contract terminable at will, defendant states, with or without cause. The jury found that defendants were parties to the broker contracts. Thus, MassMutual contends, it had the right and power to ter-

minate the broker contracts and cannot be held liable for having properly exercised its legal rights.

Wolford responds that while it is well established in Tennessee law that at-will contracts can be terminated for any reason, no reason, or even a bad reason, that doctrine is wholly inapplicable to the instant case because all the parties interpreted Wolford's contract with King as terminable by Wolford or King, but not by MassMutual. Wolford avers MassMutual's fraud was designed to induce Wolford to resign for the purpose of grabbing Wolford's non-vested renewal commissions as an offset against insurance claims. By its own admissions, MassMutual had no right to terminate Wolford's contract; King refused to do so; therefore the fraudulently induced resignation became MassMutual's method to deprive Wolford of his commissions.

Wolford argues that defendant's reliance on *Shelby v. Delta Air Lines, Inc.*, 842 F. Supp. 999 (M.D. Tenn. 1993) to show that intentional misrepresentation is inconsistent with Tennessee's employment at-will doctrine is misplaced. Wolford states that MassMutual was not his "employer" in the sense at issue in *Shelby* because MassMutual did not have the power to terminate Wolford for any reason. Only King had that power. It is undisputed that MassMutual did not have the right by its own interpretation of Wolford's career contract with King to terminate him. That is the reason MassMutual fraudulently induced Wolford to resign after King refused MassMutual's requests that King terminate Wolford's career contract.

Moreover, Wolford points out that "the interpretation placed upon a contract by the parties thereto, as shown by their acts, will be adopted by the Court, and . . . to this end not only the acts but the declarations of the parties may be considered." *Hamblen v. City of Morristown*, 656 S.W.2d 331, 335 (Tenn. 1983). Agents and employees of

MassMutual presented evidence that MassMutual lacked the authority to terminate Wolford's contract with King. Vice-President DeLisio stated:

> [I]t was not the Committee's job, for instance to terminate a contract. It had no right to do so. . . . So as far as the Committee's authority to terminate a contract between the GA and the agent, it did not have that authority.

Vice-President Winter testified King told him and Field Practices that MassMutual had no authority to terminate the contracts between King and Wolford. King also testified Field Practices did not have such authority and had the ability only to make recommendations. Moreover, King testified MassMutual did not have the authority to terminate, only the General Agent had the authority to terminate the contract with the agent. King added:

> They don't have the power to terminate Leon Wolford. They [MassMutual] don't have a contract with Leon Wolford. They were going to give me instructions to terminate him. They would terminate me, if I didn't terminate him. If they became the G.A. – if they were to terminate me and get me out of the way, they could terminate him. They are the successor G.A.

MassMutual's General Counsel Campbell testified his interpretation was that MassMutual was not even a party to the contracts between Wolford and King. Wolford avers it is not denied that MassMutual interpreted his contract as not being terminable by MassMutual and hence the reason for the fraudulent inducement to resign.

MassMutual has asserted that controlling Tennessee law precludes any compensation for loss of any at-will employment contract, relying upon the cases of *Lawhorn & Assoc. v. Patriot General Ins. Co.*, 917 F.Supp. 538 (1996); *Shelby v. Delta Airlines, Inc.*, 842 F. Supp. 999

(1993), and *Price v. Mercury Supply Inc.*, 682 S.W.2d 924 (Tenn.App. 1984). I find defendant's reliance on these cases is misplaced. Both *Lawhorn* and *Shelby* involve two-party contracts with indefinite terms and present classic employee at-will termination issues. Neither case nor any other authority relied upon by defendant involves a three-party contractual relationship such as the case sub judice.

Wolford relies upon the case of *Berger v. Security Pacific Information Systems Inc.*, 795 P.2d 1380 (Colo.App. 1990) in support of his position that fraud in connection with an at-will contract can be actionable. In *Berger*, a Denver company contacted plaintiff Berger regarding her managing a division of the company that had been performing very poorly. At the time of the contract, Berger was working in a similar capacity with a New Orleans employer. During her interview, an agent of the Denver company misled Berger as to the financial status of the company, the size of its customer base, and as to the prospects for the future. The interviewing agent also concealed the fact that the division might be discontinued in the near future.

Berger decided to take the at-will position in Denver, quit her old job, and moved to Colorado. Seven months later, Berger was terminated because of the company's poor performance. She sued for fraud in the inducement of the employment contract. The defendant contended that the at-will nature of the job precluded a claim for fraud. The court disagreed, stating:

> An employer's right to terminate an at-will employee without cause does not protect the employer from liability for fraud in inducing the employee to accept employment.

Id. at 1384.

The *Berger* case demonstrates how and why actions for fraud can arise in the at-will context. *Berger* has factual

and analytical similarity to the case at bar. Its principles are consistent with the common law in general and with Tennessee's common law in particular. MassMutual prepared Wolford's contract with King and could have granted itself the right to terminate but did not. MassMutual could have terminated King's contract with MassMutual and then as successor General Agent terminated Wolford's contract, but did not. MassMutual's rights and duties under the contract were primarily to approve insurance applications Wolford secured, and pay commissions to Wolford; MassMutual never had any right of termination under the contract, as all parties agreed. MassMutual had to resort to the fraudulent scheme to accomplish its purpose. Under these facts, I find that Wolford's fraud action is not precluded by Tennessee's employment at-will doctrine.

Moreover, even if MassMutual had the right to terminate Wolford's contract, MassMutual could not do so in order to deprive Wolford of his accrued commissions. It is well established that a party's decision to terminate an at-will contract, even when that right clearly exists, cannot be based upon a decision to reap the fruits or profits attributable to the labor of the party being terminated. *W.T. Allen v. Oil Shale Corp.*, 442 F.Supp. 137, 143 (E.D. Tenn. 1977), *aff'd* 570 F.2d 154 (6th Cir. 1978). Even in situations where the right to terminate a contract at will is clearly available, unlike the case sub judice, and even "where a principal has the right to terminate the authority of an agent at any time, such principal may not do so in bad faith as a device to escape the payment of a broker's commission." *Randolph v. New England Life Ins. Co.*, 526 F.2d 1383, 1385 (6th Cir. 1975).

Intentional Misrepresentation

MassMutual further argues that the verdict in plaintiff's favor on intentional misrepresentation is against the weight of the evidence. Proof of fraud or intentional mis-

representation requires proof of (1) a statement to plaintiff of existing material fact; (2) knowledge of the falsity of the fact at the time of the representation; (3) reasonable reliance upon the statement to his detriment; and (4) plaintiff suffered damages as a result. *Oak Ridge Precision Indus. Inc. v. First Tenn. Bank Nat'l Ass'n*, 835 S.W.2d 25, 29 (Tenn.App. 1992). MassMutual asserts that a promise of future employment pursuant to an at-will contract cannot, as a matter of law, support a claim for fraud because the contract may be terminated at any time. *Price*, 682 S.W.2d at 934.

As to the elements necessary to prove a case of intentional misrepresentation, MassMutual states that no proof was presented of a claimed misrepresentation that Wolford resigned his career contracts based on King's promises that he would retain his commissions if he resigned. MassMutual points to Wolford's testimony that King said "the Home Office was going to terminate my [career] contract" and that "it would be in your best interest if you resign your career contract and take a broker contract because if you get terminated it will be very hard for you to get another AAA carrier like MassMutual for you to work for." MassMutual argues plaintiff gave no testimony that King promised him commissions if he resigned, nor did King testify that he promised Wolford commissions if he resigned.

MassMutual contends there was no proof that King spoke falsely. King believed he spoke truthfully. He wanted to help Wolford, and wanted to get him a broker contract because it benefitted King financially. Moreover, MassMutual avers King made no statement pertaining to a past or existing fact. King testified that he "thought" the broker contracts were a go, but an unexpressed thought cannot support a claim of misrepresentation, defendant asserts. As to the reliance element, MassMutual states that Wolford admitted that he knew his career contracts were terminable at will. His career contracts

spelled out what he would retain post-termination. Defendant avers Wolford was not reasonably giving up anything as a result of King's statements, and cannot claim that his resignation came about in reasonable reliance on King's promise of broker contracts.

MassMutual avers there was no proof of an intent to deceive Wolford. King did not intend to deceive Wolford, – he fervently sought to make his promise of broker contracts come true. Accordingly, King's good intentions, and lack of intent to deceive, must be attributed to MassMutual, defendant argues. The theory of liability against MassMutual is vicarious liability for the intentional tort of an agent; if agent King's actions are imputed to MassMutual to establish liability, King's intentions must also be imputed, and since King's intentions were good ones, not an intent to deceive, this key element has not been established.

Finally, MassMutual avers there is no causal link between anything King said or did and Wolford's loss of his career contracts. As to the termination of the broker contracts, defendant contends that they were also terminable at will. MassMutual argues that the jury verdict on the procurement count established that MassMutual had the right to terminate Wolford's at-will contracts. Therefore, as a matter of law, there can be no monetary liability for their termination. *Lawhorn*, 917 F. Supp. at 543. Wolford was induced by King to resign his at-will career contracts and take at-will broker contracts. Wolford's broker contracts were later terminated, again an act that cannot have adverse consequences as a matter of law. There is no rationale or factual basis for imposing liability for intentional misrepresentation, MassMutual concludes.

Wolford argues that the jury's finding that MassMutual committed fraud and intentional misrepresentation is supported by the record and applicable law. The six ele-

ments of fraud or intentional misrepresentation were satisfied as follows:

(1) MassMutual made false representations: The evidence showed that MassMutual had made false representations directly to Wolford and had also done so through MassMutual's agent King. MassMutual's first misrepresentations began in March 1997, when MassMutual began accusing Wolford of fraud concerning his assistance to Norman with his claim forms when they knew such accusations were false. Thereafter, MassMutual also made false representations to Wolford when MassMutual told Wolford and King that eight to ten successful applications for insurance had been fraudulently submitted by Wolford for unqualified applicants. Finally, after King's discussions with MassMutual's high level executives, Wolford was told that if he resigned he would be awarded a broker contract that would allow him to retain his renewal commissions when this was not true.

(2) MassMutual made false representations of past or present material facts: Wolford contends MassMutual's officers, Winter, Campbell, and DeLisio all testified that the information Wolford supplied for Norman's APS was false and misled MassMutual. MassMutual misrepresented to Wolford and King that Wolford had falsely reported information on insurance applications. MassMutual also misrepresented to Wolford that if he resigned, he would be awarded a broker contract that would allow him to retain his renewal commissions when this was not true. MassMutual made these representations to convince King to terminate Wolford's contract and/or to induce Wolford to resign. The representations were clearly material, Wolford states. Otherwise, King would never have told Wolford his career contract and insurance license were in jeopardy, nor told him he faced criminal prosecution, nor would Wolford have resigned his career contract.

(3) Wolford contends MassMutual knowlingly made false representations: Dr. Vellayan's letter to MassMutual's investigator proves that MassMutual knew that the information Wolford supplied on the Norman APS was correct. Norman told MassMutual's claims representative he was a vice-president, and King told MassMutual that Wolford was complying with his training and with MassMutual's established written requirements for completing forms. MassMutual then falsely accused Wolford of submitting fraudulent applications for non-qualified miners, but MassMutual refused to identify them to Wolford or King.

Additionally, Wolford avers that MassMutual's efforts, through their investigator, to determine the amount of his non-vested future renewal commissions provides circumstantial evidence of MassMutual's motive and intent to strip him of his commissions to offset miners' claims. Hunady testified that Executive Vice-President Davies instructed him to determine the amount of Wolford's future renewal commissions. Moreover, Senior Vice-President Pugh admitted to King that the reason MassMutual wanted Wolford's contract terminated was because of the "liability he (Wolford) created for the Home Office." Wolford testified that "it was a business decision. . . . I had a lot of renewals and commissions coming to me. It was a business decision to take the money." Wolford avers MassMutual wanted his renewal commissions to offset claims by the insured coal miners.

(4) MassMutual intended Wolford to rely on its misrepresentations. Wolford argues that since King would not terminate his contract with him – and more importantly, since MassMutual, King and Wolford all agreed in their interpretation of his contract with King that MassMutual did not have the authority to terminate his contract with King – MassMutual intended that Wolford rely upon their misrepresentations and act upon them by submitting his resignation. Thus, Wolford avers a jury could find he

would not have resigned had he known MassMutual's statements were false.

(5) Wolford was justified in relying upon MassMutual's representations as truthful: Despite King's testimony that Wolford conducted himself at all times in accordance with MassMutual's own training and written rules, Wolford was convinced otherwise by MassMutual, and even testified he thought he had violated MassMutual's rules by completing the Norman APS. Because of MassMutual's misrepresentations, Wolford avers he had an inaccurate but honest belief that he a violated a "rule," when in truth he had actually followed the rules and training he had received. Additionally, despite Wolford's and King's repeated requests before Wolford's resignation, MassMutual would not reveal the names of those miners who, according to MassMutual's investigators, had stated that information Wolford placed on their applications was false. Thus, while Wolford did not believe he had done such, he did not know the basis for MassMutual's representations; he had no way to defend himself or to otherwise prove MassMutual's representations were false; and there were discussions of possible "jail time" and loss of his license. Wolford was, as King testified, "fighting ghosts."

Wolford submits his responsibilities for soliciting applications were limited to recording the information provided him by the applicants during an interview. Each applicant was required to sign his application, after Wolford had recorded the information, and certify it as true and correct. Since Wolford believed he had followed correct procedure, he could not know MassMutual's representations – relative to unspecified miners stating Wolford had recorded information falsely – were themselves false. Wolford contends he was justified in relying upon the truth of MassMutual's representations, including those by MassMutual's agent King who repeated to Wolford what MassMutual's officers told him. Wolford testified he had

been a career agent for MassMutual for over 20 years and had worked for King for years and trusted him. Clearly, a reasonable jury could find he was justified in relying upon what he was being told, Wolford concludes.

(6) MassMutual's fraud damaged Wolford: Damages to Wolford included his loss of non-vested renewal commissions of approximately $1 Million, fringe benefits, office expenses, pension benefits, income from continued sales of MassMutual's counterclaims of $11.4 Million, and potential criminal charges against him. Additionally, MassMutual's agreement that Wolford resign and transfer to a broker contract (which King carried out and MassMutual approved, only to have MassMutual termimte the broker contract), further damaged Wolford. Wolford states he was stripped of all non-vested renewal and persistency commissions, pension benefits, office override, fringe benefits, and the right to maintain his established block of business as MassMutual's representative. Wolford avers MassMutual's termination of the broker contract was deceptive, but even if he had not been granted a broker contract, severe damage to him had already been caused by MassMutual's fraudulent inducement to resign from his career contract.

The jury's verdict should be approved when it is one which could reasonably have been reached. *TCP Industries, Inc. v. Uniroyal, Inc.*, 661 F.2d 542, 546 (6th Cir. 1981). When the jury's verdict is one which is against the weight of the evidence or seriously erroneous it should be overturned as being against the weight of the evidence. *Holmes v. City of Massillon*, 78 F.3d 1041 (6th Cir. 1996). The trial court should deny a motion for new trial when the verdict is one that reasonably could be reached, regardless of whether the trial court might have reached a different conclusion were he the trier of fact. *Powers v. Bayliner Marine Corp.*, 83 F.3d 789 (6th Cir. 1996). The trial court may not set aside a verdict and grant a new trial because it could have drawn different inferences or

conclusions, or because it feels another result would be more reasonable. *Hinkle v. Waddell*, 945 F.2d 404, 1991 WL 191546 (6th Cir. 1991) (unpublished case).

The undersigned finds there is ample evidence from which the jury could find that Wolford's resignation from his career contract with King was induced by MassMutual's intentional misrepresentations. Wolford produced evidence that MassMutual's motivation to capture his commissions resulted from what MassMutual perceived as a "flurry of claims" received in 1996 which arose from applications submitted by Wolford. MassMutual wanted to retain Wolford's non-vested renewal commissions of approximately $1 Million to offset the claims. Evidence was presented that MassMutual used Norman's APS form as its initial fraudulent pretext for requesting King to terminate Wolford. MassMutual claimed Wolford supplied false and misleading information on the APS form and that MassMutual's rules prohibited Wolford from completing such forms. Both of MassMutual's assertions were rejected by the jury.

King informed Wolford of MassMutual's assertions but refused to terminate Wolford's contract. Wolford and King submitted information to MassMutual to show that the information Wolford had supplied was accurate and in compliance with Norman's request, and that Wolford had been trained to supply such information when a claim form was incomplete. Moreover, King told MassMutual's officers that its own established rules and procedures required an agent to do so. Evidence was also presented that MassMutual had received a written and signed statement from Norman's physician that the information Wolford had added to the claim form was correct.

Based on the evidence, the jury could reasonably find that since MassMutual could not convince King to terminate his contract with Wolford using the Norman APS issue, it attempted to induce King to terminate Wolford's

contract by claiming Wolford had submitted false and misleading applications for miners. Wolford and King repeatedly requested the names of these applicants, but MassMutual refused to provide them. Wolford told MassMutual and King he did not believe he had done such, but without specific names he was in effect defending against "ghosts." Wolford produced evidence that he submitted applications with accurate information and that those applicants did in fact meet MassMutual's underwriting rules.

Moreover, Wolford presented evidence that he was advised by King he should nevertheless resign from his career contract to avoid being terminated and thereby face loss of his securities license, blacklisting in the industry, and potential prosecution by MassMutual. King also testified he had obtained from MassMutual's executives, prior to Wolford's resignation, assurances that Wolford would receive his renewal commissions after his resignation. Wolford also presented evidence that he agreed to resign based on those assurances and the further promise of a broker's contract such that he could continue to service his existing client base.

MassMutual claims Wolford was not damaged by its alleged misrepresentations because under the career contract, Wolford's renewal commissions were non-vested for the policy renewal years 6-10. But King testified he was not aware, until the Wolford case, that long-term agents could have non-vested commissions. King stated he reviewed the career contract and commission schedules before Wolford resigned, could not understand them, and asked Burvin Pugh about them. King also testified he did not receive the vested/non-vested schedule pertaining to Wolford "until the deal was over."

When King received the document as to non-vested commissions he called Burvin Pugh and said "this was not supposed to happen" when Wolford resigned his career

contract. "Burv communicated he thought the same." In fact, Pugh told King the reason for the anomalous result was not due to the career contract language and Wolford's resignation and transfer to a broker contract, but rather Pugh stated it was because of the claims MassMutual had received and did not want to pay. Thus by inducing his resignation, MassMutual could capture Wolford's commissions to set-off against the insurance claims. As King put it: "I asked the question, why are they not going to release the renewal streams and so forth. . . . The answer given to me was 'a large reason is the liability he created for the Home Office.'"

MassMutual through King represented to Wolford, before he resigned, he would keep his non-vested renewals and he would receive a broker contract. Wolford resigned relying on these representations, but they turned out to be false. MassMutual then reneged on its deal. Wolford relied on King and stated that "he trusted King" and relied on King as his boss, MassMutual's General Agent, and in effect saw King as MassMutual concerning the assurances about his renewal commissions.

After construing the evidence most strongly in favor of the non-movant and discarding all countervailing evidence, I find that reasonable minds could not differ as to the conclusions to be drawn from the evidence, and the jury correctly found that Wolford's resignation from his career contract with King was induced by MassMutual's intentional misrepresentations. Tennessee courts have long recognized that fraud is often difficult to prove, that defrauders do not normally leave exquisite paper trails or take eyewitnesses with them; thus fraud may be properly proved by circumstantial evidence. *Edwards v. Travelers Insurance of Hartford, Conn.*, 563 F.2d 107, 113 (6th Cir. 1977) (citations omitted).

Field Investigation Notes

MassMutual also asserts that the court erred in excluding evidence establishing the factual basis upon which the MassMutual Field Practices Committee reached its conclusions. On May 8, during Ben Joiner's testimony, the court ruled that the MassMutual investigator's notes were inadmissible, citing *EEOC v. Ford Motor Co.*, 98 F.3d 1341, 1996 WL 557800 (6th Cir. 1996) (unpublished case). During the direct examination of defendants' witness, Denis Hunady, the court also excluded a memo dated May 21, 1997 to Field Practices, which summarized the evidence gathered during the investigation. Hunady testified that the memo summarized discrepancies he found between information on miner's applications for insurance and the facts as reported during interviews.

MassMutual argues that the memo and other investigatory materials in the Hunady file were admissible to show the factual predicate for the Field Practices decisions, citing the case of *Bush v. Dictaphone Corp.*, 161 F.3d 363 (6th Cir. 1998). In *Dictaphone*, defendant states the Sixth Circuit affirmed the district court's admission of statements of what the corporate decision-maker had been told by plaintiff's unidentified co-workers, finding that the statements were "admissible for the limited purpose of considering the grounds upon which the declarants based their decision with regard to the employment status of the plaintiff." *Id.* at 367. The statements were not hearsay because they were not offered to show whether plaintiff was in fact "abusive or unstable," but rather to show the basis for the defendant's decision. *Id.* at 366-67. In accordance with *Dictaphone*, MassMutual contends that all material reviewed by Field Practices as the factual basis for its decisions should have been admitted.

Had the court permitted the full use of these investigatory materials, Joiner and Hunady could have testified fully about information obtained during the course of the

investigation and presented to Field Practices. Committee members Winter, Campbell, Gray and DeLisio could have testified as to their evaluations of the reports they received, and provided specific details as to the reasons underlying the directions to terminate Wolford. MassMutual argues it was prejudiced by the exclusion of this evidence.

Wolford responds that MassMutual may not avoid application of the hearsay rule by claiming the field investigation notes were offered to "demonstrate the nature of the information before Field Practices" and therefore are not offered for the truth of the matters therein. Wolford asserts that notes of the interviews would not be relevant to prove either MassMutual's counterclaims, or to defend against Wolford's claims of fraud unless they were offered for the truth of the matters asserted, and therefore were properly excluded under Rules 401 and 402, Federal Rules of Evidence. Further, at trial, MassMutual actually offered the notes for the truth of their assertions and claimed that the compound hearsay evidence of MassMutual's investigators' notes from interviews of insured miners comprised business records and contained present sense impressions.

Wolford argues MassMutual's reliance on *Bush v. Dictaphone* is misplaced. In *Dictaphone*, the statements were made by corporate decisionmakers who had been told a discharged employee was abusive. Dictaphone offered the statements to prove it had a reasonable basis to believe the statements to be true and not for their truth. In the instant case, however, MassMutual sought to prove the truth of the matters, i.e., that Norman was not a supervisor and was not disabled. Whether offered in defense of Wolford's claims against MassMutual or in support of MassMutual's counterclaims against Wolford, MassMutual was required to show the matters asserted were true, otherwise they have no relevance.

Wolford points out that MassMutual subpoenaed for evidentiary depositions the very declarants MassMutual interviewed. All those whom MassMutual actually deposed confirmed Wolford performed his duties as required. After hearing testimony from the first five deponents, MassMutual canceled its other scheduled depositions. Thus, Wolford states MassMutual had available the actual declarants who either failed to support MassMutual's claims or were released from subpoena by MassMutual.

Moreover, Wolford asserts MassMutual could have no reasonable basis to believe there were intentional misrepresentations about the Norman APS after (1) MassMutual's own claims representative interviewed Norman, (2) the personnel manager at Norman's mine interviewed Norman, (3) King and Wolford both told MassMutual that Wolford was following MassMutual's own written instructions, and (4) Dr. Vellayan confirmed the information Wolford added to the claim form was correct. Rather than abandon its plan to have King terminate Wolford, which MassMutual initially had based on the Norma APS, MassMutual began preparing for litigation and sent out its investigator to find a basis to support Wolford's termination. MassMutual directed the interviews, and even accused Wolford of fraud and completed official fraud reports for the State of Kentucky. Vice-President Foresi confessed to another executive, Matt Winter, the decision to insure miners was a mistake.

In *EEOC v. Ford Motor Co.*, 98 F.3d 1341, 1996 WL 557800 (6th Cir. 1996) (unpublished case), the EEOC sued Ford under Title VII for alleged racial discrimination against a Ford employee. The EEOC wanted to introduce its "cause determination" (administrative investigation). The district court excluded the cause determination. The Sixth Circuit held the district court did not err in denying the admission of the EEOC determination into evidence. *Id.* at *11.

> Moreover, an EEOC cause determination carries an evidentiary value of practically zero. . . . Generally, the only plausible value of an EEOC cause determination would be that it presents the evidence of discrimination that the EEOC considered. Presumably, much of that same evidence could be adduced at trial, and therefore the admission of the EEOC cause determination referencing it would be redundant. As for any evidence contained in an EEOC cause determination that is properly excluded at trial, an attempt by the EEOC to admit those parts of the EEOC cause determination becomes a not-too-subtle attempt to end-run the Federal Rules of Evidence.

Id. at *10.

I find the reasoning in *EEOC v. Ford* applicable to the instant case. The investigator's field notes present evidence which MassMutual claims led it to try to persuade King to terminate Wolford. These notes were prepared by MassMutual, maintained by MassMutual; and their reliability was seriously undermined by the differences between assertions made in the notes and the sworn deposition testimony of the same witnesses. The evidence could have been adduced at trial, but MassMutual never attempted to do so, as it canceled its own depositions of the remaining witnesses. Indeed, much of it was contradicted by MassMutual's own witnesses' videotape deposition testimony of Robinson, Hunt, Marcum and Fritz, and also by Dr. Vellayan's deposition and his letter to Hunady. MassMutual's attempt to introduce the notes is, in *EEOC*'s words, "a not-too-subtle attempt to end-run the Federal Rules of Evidence." *EEOC* quotes other language which is appropriate to this issue:

> Credibility of witnesses will play a major role in resolving the conflicting positions of the parties here; justice requires that the testimony of the

> witnesses be given in open court, under oath, and subject to cross-examination. . . . The credibility of witnesses has historically been the sole function of the fact finder. . . . In addition to its very questionable probative value, EEOC reports may be prejudicial, irrelevant, and unreliable. . . . It is undisputed that the EEOC report is merely a cumulation of hearsay. . . . Our analysis leads to the conclusion that the exclusion of an EEOC cause determination does not "deprive" a Title VII plaintiff in the admission of any evidence that the plaintiff is entitled to introduce. The plaintiff remains able to seek the live testimony of witnesses and the inclusion of any documents that should be admitted under the Federal Rules of Evidence. Plaintiff is not entitled to have admitted evidence that is properly excluded under the Federal Rules of Evidence.

Id. at *11-12.

The unreliability and self-servingness of the field notes sufficiently bring them within the type of evidence *EEOC* excludes, without any examination of hearsay exceptions being necessary. Since MassMutual refused to divulge to Wolford the names of those interviewed by its investigators, Wolford could conduct no interviews or discovery. Thus, the danger of unfair prejudice to Wolford or misleading the jury permitted exclusion of the interview evidence under Rule 403, Federal Rules of Evidence. Trial testimony of some of the interviewees was introduced by MassMutual and others were available, but MassMutual canceled its own depositions.

Moreover, due to their untrustworthiness, all field investigation notes made after March 18, 1997 by MassMutual's investigators were properly excluded at trial as hearsay and/or compound hearsay, and none fell within the business records exception relied upon by Mass-

Mutual. On March 31, 1997, MassMutual's vice-president wrote his superior: "[W]hen more and more of these decisions are ending up in contract termination, I think we are setting ourselves up for some serious legal actions either now or in the future." King wrote MassMutual on April 3, 1997 that Wolford could "afford excellent legal representation." MassMutual – alerted that termination of Wolford's contract would likely result in litigation – was preparing for litigation.

Entries made in reports prepared primarily for purposes of litigation and not for systematic conduct of business are properly excluded. *Palmer v. Hoffman*, 318 U.S. 109 (1943). The hearsay exception for business records will not be allowed when "the source of information or the method or circumstances of preparation indicate lack of trustworthiness." *See Lloyd v. Professional Realty Services, Inc.*, 734 F.2d 1428 (11th Cir. 1984). Additionally, there was no business duty on the part of those being interviewed by MassMutual's investigators to report the requested information. *See e.g., City of Cleveland v. Cleveland Elec.*, 538 F. Supp. 1257 (1980), *aff'd* 734 F.2d 1150 (6th Cir. 1981).

The notes also are shown to be untrustworthy by testimony from MassMutual's witnesses. First, MassMutual's associate general counsel testified that information Wolford added to the Norman APS was incorrect, whereas Dr. Vellayan testified to the contrary by deposition, and also stated to the contrary by letter. Second, MassMutual claimed that Wolford violated certain rules concerning the securing of insurance applications. The field investigation notes from Hunady and Joiner reported several such violations. MassMutual served depositions notices on nine applicants. The first five failed to corroborate the statements attributed to them by MassMutual's investigators, whereupon MassMutual canceled the remaining four scheduled depositions. Thus, due to untrustworthiness, I find no field investigator notes prepared after March 18,

1997 fall within the business records exception, Rule 803(6), Federal Rules of Evidence.

Neither the present sense impression exception nor double hearsay exception applies. Rule 803(1), Federal Rules of evidence requires a proffered statement be one "describing or explaining an event or condition while the declarant was perceiving the event or condition, or immediately thereafter." In each instance, when Hunady purports to relate information supplied by an interviewee, the interviewee's statements pertain to conversations he allegedly had with Wolford *months or years earlier*.

For example, interviewee Hurley stated he had been out of work since January 1997. He had become insured by MassMutual prior to that time. Hunady interviewed him the week of May 12-16, 1997. Hunady's notes state: "Hurley stated that Leon Wolford was fully aware of what his [Hurley's] duties consisted of and of the amount of time that he spent underground at the time the application was taken out." Hurley is not recounting a present sense impression of his own, since his application process with Wolford occurred many months prior to Hunady's interviewing Hurley. In the case of Curtis Francis, the application for insurance was submitted in the late 1980's, some 11 years before the interview and 5-6 years before the underwriting rule was adopted. Since the events the declarants related to Hunady occurred months or in most cases years earlier, Hunady's notes of declarants' remembrances cannot contain declarants' present sense impressions and do not fall within the exception of Rule 803(1), Federal Rules of Evidence.

As discussed above, Hunady's notes do not qualify for the business records exception, since they are untrustworthy and were prepared in anticipation of litigation. Nor were the declarants' statements to Hunady the declarants' present sense impressions. Since neither hearsay

statement is an exception, the double hearsay exception of Rule 805, Federal Rules of Evidence, is not met.

Finally, as previously noted, MassMutual issued and served notices of nine depositions for nine miners for whom MassMutual claimed Wolford committed fraud in submitting their applications for insurance by misrepresenting their job titles and the time spent underground. However, after the first five testified to the contrary, MassMutual canceled the remaining four depositions. MassMutual could have obtained testimony from those witnesses by bringing them to court but chose not to do so. Rather, MassMutual wanted to introduce before the jury its version of the facts. This was a hotly contested case, and the contention by MassMutual that the notes were being offered for reasons other than for the truth of the matters asserted therein was and is rejected by the court. It was the determination of the undersigned at trial that the investigators' field notes were inadmissible, and it is the undersigned's opinion now that this evidence was correctly excluded at trial.

Jury Instructions Concerning Fraud

MassMutual's amended motion claims that MassMutual's misrepresentations, as stated in the court's charge to the jury, were not as to present or past material facts, but this is inaccurate. MassMutual's selection of only a portion of the jury charge distorts the court's instructions. The court's pretrial order [Doc. 101] states that Wolford claims MassMutual, through the conduct of King, fraudulently induced him to resign his career contract. Wolford claimed King made false representations to him that if he resigned, he would receive a broker contract and he would continue to receive his commissions. Wolford also claims his resignation was not voluntary and was made under the threat of termination. The court instructed the jury, prior to the presentation of any evidence, as follows:

> Plaintiff also sues defendants, asserting that through their agent, Tom King, defendants committed a fraud upon him by encouraging him to resign his position as a career agent with defendants upon the expectance that he would receive brokers contracts with defendants.

Prior to the evidence, the court also instructed the jury as to the elements Wolford needed to prove for the tort of intentional misrepresentation. At the conclusion of the evidence the court again instructed the jury as to the elements of intentional misrepresentation, and added:

> If you find from the evidence that Tom King, as agent for defendants, knowingly made a false representation to plaintiff to induce him to resign his career contracts with King, that plaintiff reasonably relied on the representation and as a result sustained damages, then you will find for plaintiff on this issue. If plaintiff has failed to prove any of the required elements, then your finding will be for defendants on this issue.

The Special Verdict Form specifically states in Question 5: "Do you find that Mr. Wolford has shown . . . that Massachusetts Mutual made intentional misrepresentations . . ."

MassMutual's objection to these instructions ignores the totality of the court's jury instructions and seeks to limit the jury's application of the law to only the broker contract. The evidence established that MassMutual's fraudulent misrepresentations were far more extensive. They began as early as November 1996, and continued through July 1997, long before the subject of the broker contract ever arose. Wolford testified he would never have considered resigning from his career contract but for MassMutual's misrepresentations to convince or force King to terminate him. The evidence established that King's representations to Wolford that if he resigned he

would receive the broker contract and he would continue to receive his commissions were made in the July 13 telephone conversation between King and Wolford. King's July 16 letter confirms that discussion. For example, King wrote:

> As we discussed – I will provide you with all the service information you need to continue servicing your clients, just as you have in the past. Also, as we discussed . . . since you are vested your renewals will continue.

This letter thus provided evidence that all of King's statements to Wolford resulted from King's previous discussions and correspondence with MassMutual's executives.

The evidence further established that Wolford was induced to resign by MassMutual's misrepresentations of past and present facts (the Norman claim, alleged misstatements in applications submitted by Wolford, issuance of the broker contract, and the retention of the renewals). MassMutual wielded these past-fact misrepresentations to convince King to terminate Wolford's contract and/or to induce Wolford to resign his career contract. When King refused to terminate Wolford's contract, MassMutual made additional present-fact misrepresentations regarding the issuance of the broker contract and retention of commissions. Wolford faced a Hobson's choice, resign or have King terminate his career contract. Resignation and acceptance of the broker contract would allow Wolford to avoid the consequences of termination (never again being able to work for a top tier company, loss of his securities and insurance licenses, possible criminal prosecution, and loss of his renewal commissions). Wolford resigned and accepted the broker contract which MassMutual terminated after Wolford, King, and MassMutual all three had signed. It was the determination of the undersigned at trial that the jury was correctly

charged, and it is the undersigned's opinion now that the jury charge was correct.

The Compensatory Damages Verdict

Without waiving its argument that Tennessee law prohibits any cause of action based on oral statements/misrepresentations in terminating or inducing the termination of an at-will contract, MassMutual contends that even if some damages were recoverable, they must be specifically to compensate for the injury caused by the detrimental reliance on the misrepresentation. Generally, a plaintiff injured by reliance on a fraudulent misrepresentation is entitled to recover the value of "the pecuniary loss to him of which the misrepresentation is a legal cause, including . . . pecuniary loss suffered otherwise as a consequence of the recipient's reliance upon the misrepresentation." *Restatement (Second) of Torts* § 549; *Boling v. Tenn. State Bank*, 890 S.W.2d 32 (Tenn. 1994). However, MassMutual contends, because the action Wolford alleges he was "induced" to take was resignation of an at-will contract which was about to be terminated, no "loss" can be attributed to his reliance on King's statements. Had he not resigned, he would have been terminated without compensation, MassMutual argues.

Alternatively, Wolford could claim as damages the "benefit of the bargain," that is, the value of the promise as made. *Blasingame v. American Materials*, 654 S.W.2d 659, 665 (Tenn. 1983) ("The basic rule prescribing the measure of damages for fraud is that the injured party should be compensated for the actual injuries sustained by placing him or her in the same position that he or she would have occupied had the wrongdoer performed and the fraud not occurred."). Under this theory, MassMutual avers, Wolford could argue that he should recover the value of the broker contracts for some period of time. However, MassMutual contends that an at-will contract is nothing more than a prospective economic advantage,

subject to the continued willingness of the other party to continue the contract, and Tennessee law has rejected interference with prospective economic advantage as a tort. *Nelson v. Martin*, 958 S.W.2d 643 (Tenn. 1997).

In sum, MassMutual argues that the compensatory damages award of $1.9 Million, the value of the loss of the career contracts, is unrelated to any conceivable measure of damages for the intentional misrepresentation and must be set aside, either as a matter of law or because it is overwhelmingly against the weight of the evidence. As an alternative, MassMutual avers the court has the power to reduce the verdict if "the verdict is beyond the range of reasonableness." *Smith v. Shelton*, 569 S.W.2d 421, 427 (Tenn. 1978) (*quoting Stark v. Yost*, 334 S.W.2d 954, 958 (Tenn.App. 1939). MassMutual argues that there is no basis upon which to calculate any amount (other than zero) for the verdict, and the court should therefore reduce the verdict to zero [Doc. 133, 142].

Wolford responds that since he had been a career agent for over twenty years, a jury could reasonably find he more likely than not would have continued but for MassMutual's fraud. Wolford states the evidence presented in support of his claims for compensatory damages included his personal tax returns for 1991-1999, the Significant Benefits Statement prepared by MassMutual for the period ending 1995, the testimony of King, plaintiff, plaintiff's expert, Michael Costello, CPA, and his report and supplemental report. The jury was presented with evidence Wolford suffered the following damages:

(1) lost renewal commissions of approximately $1,000,000;

(2) lost pension benefits of nearly $400,000;

(3) lost annual office expense reimbursement of 35% of his compensation, which totals approximately

$125,000, i.e., $50,000 per year from July 1997-May 2000;

(4) lost fringe benefits of $70,000, i.e., $28,000 x 2-1/2 years; and

(5) lost income between July 1997 and the trial of approximately $399,400)

Thus, Wolford's damages as of the trial date were at least $1,994,000. MassMutual's own documents and special benefits witness, Forni, testified that as of 1995, Wolford's lost commissions and pension benefits alone were in excess of $1.3 Million. King testified that Wolford lost additional renewals for the period between December 1995 and July 1997 of $1 Million. Wolford's expert testified he estimated Wolford's lost income from resignation until expected retirement date was approximately $1.3 Million. Thus, Wolford presented evidence of $3.2 Million total damages. Wolford proved damages of $1.9 Million without taking into account any of his lost income past the trial date [Doc. 145].

The basic rule prescribing the measure of damages for fraud is that the injured party should be compensated for the actual injuries sustained by placing him in the position that he would have been in had the fraud not occurred. *Blasingame v. American Materials, Inc.*, 654 S.W.2d 659, 665 (Tenn. 1983). As correctly noted by plaintiff, under Tennessee law if there is substantial evidence in the record from which reasonable inferences may be drawn, mathematical certainty as to damages is not required. *Cummins v. Broady*, 667 S.W.2d 759, 765 (Tenn.App. 1983); *Acuff Vinsant*, 443 S.W.2d 669, 674 (Tenn.App. 1969). Plaintiff is only required to prove his damages by a preponderance of the evidence, and plaintiff did that in this case.

Accordingly, viewing the evidence in a light most favorable to the non-moving party, defendant's motion for re-

mittitur of the compensatory damages verdict must be **DENIED**. The evidence presented during the course of the trial established that the award of the jury is not beyond the range supportable by the proof introduced at trial or so excessive as to shock the conscience, or the result of a mistake. After reviewing the evidence presented during the course of this trial, it is the determination of the undersized that the evidence preponderates in favor of the jury verdict in this case. The award of the jury appears to be within the range of reasonableness, the amount does not shock the conscience of the court, and, in the opinion of the undersigned, the compensatory award of the jury should neither be set aside nor reduced.

MassMutual has characterized plaintiff's damages as a claim for interference with prospective economic advantage, which defendants aver should be dismissed as a matter of law pursuant to the decision of the Tennessee Supreme Court in *Nelson v. Martin*, 958 S.W.2d 643 (Tenn. 1997). Defendant made this same argument in its motion for summary judgment prior to trial. As stated in the court's memorandum and order denying defendant's motion for summary judgment [Doc. 70], the undersigned does not believe *Nelson* is applicable to the case at bar as the plaintiff d[illegible]llege a claim for interference with prospective economic advantage. Rather, plaintiff alleged and proved his claim for fraud in the inducement of his resignation of his contract of employment with Tom King. As discussed above, Wolford proved damages of $1.9 Million without taking into account any of his lost income past the trial date. I find defendant's argument on this issue without merit.

Thirteenth Juror Rule

MassMutual asks the court to invoke Tennessee's "Thirteenth Juror Rule." Since the weight of the evidence on the preceding issues preponderates in Wolford's favor, a re-weighing by the court can reach only the same conclu-

sions as reached by the jury. In fact, the jury was instructed it had to find fraud by the high standard of clear and convincing evidence, before punitive damages could be assessed. The jury so found. The undersigned is of the opinion that the clear weight of the evidence supports the jury's verdict and award of compensatory damages.

The Punitive Damages Award

The undersigned has previously conducted a review of the punitive damages verdict in this ease in accordance with *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992) and other applicable law. In the memorandum and order entered August 1, 2000, I suggested a remittitur of the punitive damages award of $47.3 Million, leaving a punitive damages award of $7.6 Million (four times the compensatory damages award) [Doc. 134]. MassMutual requests a further remittitur of the punitive damages award. Wolford, on the other hand, argues that any remittitur is improper. After careful review of the arguments submitted by the parties, I find that the suggested remittitur is correct for the reasons contained in my memorandum August 1, 2000, which is incorporated herein by reference.

If plaintiff rejects the court's suggestion of remittitur, then the court will conduct a new trial limited to the issue of the amount of punitive damages. The court will inform the jury that the defendant has been found liable for punitive damages, and the parties may then proceed to put on proof relevant to the factors set forth in *Hodges*.

Noerr-Pennington Doctrine

MassMutual asserts the court's ruling admitting its counterclaims into evidence to demonstrate intentional acts of malice against Wolford, was unconstitutional un-

der the *Noerr-Pennington* doctrine.[1] Defendant argues the First Amendment prohibits any assertion of liability for the act of bringing a lawsuit or asserting a claim for relief unless the claim is "objectively baseless" and brought as a sham solely for illegal or abusive purposes. *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 61-62 (1993).

MassMutual further argues that the court's submission of the counterclaims to the jury and denial of Wolford's Rule 50 motion bars any argument that MassMutual's counterclaims could somehow constitute malicious prosecution let alone fall under the *Noerr-Pennington* exceptions. MassMutual avers the court's decision allowing the counterclaims to be cited as evidence of malice in support of punitive damages was extremely prejudicial. Wolford was allowed to testify that the counterclaims would have destroyed him financially for the rest of his life and implied that they had caused him devastating emotional harm. By allowing the jury to punish MassMutual for bringing claims that are immunized under the First Amendment, the court violated the *Noerr-Pennington* doctrine, MassMutual argues.

The Noerr-Pennington doctrine holds that business interests may combine and lobby to influence the legislative, executive, or judicial branches of government or administrative agencies without violating the antitrust laws, because such activities are protected by the First Amendment right of petition. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *United Mine Workers of Amer. v. Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). Under the Noerr-Pennington doctrine, liability may not be assessed under

---

[1] *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

§ 1983 or the anti-trust laws except in very limited circumstances, for actions taken when petitioning authorities to take official action, regardless of the motives of the petitioners, even where the petitioning activity has the intent or effect of depriving another person of property interests. *Video Int'l Prod., Inc. v. Warner-Amex Cable Communications, Inc.*, 858 F.2d 1071, 1084 (5th Cir. 1988), *cert. denied*, 491 U.S. 906 (1989).

MassMutual attempts to extend the immunity provisions of the Noerr-Pennington doctrine beyond the assertion of claims in an anti-trust action to its assertion of a counterclaim in this case. MassMutual has cited no authority for such an extension of immunity and the court has found none. Accordingly, I find MassMutual's argument that the admission of evidence concerning its counterclaim during the punitive damages hearing violated the Noerr-Pennington Doctrine is without merit.

Moreover, this evidence was only permitted after the jury first found that punitive damages were appropriate in this case, and under *Hodges v. Toof*, 833 S.W.2d 896 (Tenn. 1992), trial courts are instructed to consider, among other factors: (1) the nature and reprehensibility of defendant's wrongdoing, i.e., the impact of defendant's conduct on the plaintiff; (2) defendant's awareness of the amount of harm being caused and defendant's motivation in causing the harm; and (3) the duration of defendant's misconduct and whether defendant attempted to conceal the conduct. *Id.* at 901-02. The jury should be allowed to consider the impact the prosecution of the counterclaim had on plaintiff. From the paucity and probative value of the evidence presented by MassMutual in support of its counterclaim, the jury could reasonably find MassMutual had a wrongful motive in asserting the counterclaim. It was the determination of the undersigned at trial that evidence of MassMutual's counterclaim was admissible under *Hodges*, and it is the undersigned's opinion now that this evidence was properly admitted at trial.

Motion Pursuant to Rules 58, 59(e) and 60

On June 8, 2000, defendants filed two motions relating to the entry of judgment. The first motion, pursuant to Rules 58, 59(e) and 60, sought correction of the form of judgment, the parties against which it was entered, entry of judgment on the counterclaims, etc. By their supplemental motion filed August 17, 2000 [Doc. 143], defendants state that this motion has been effectively resolved by the court's memorandum and order dated August 1, 2000, and the subsequent amended judgment in a civil case entered August 4, 2000. Accordingly, defendants' motion to correct the form of the judgment [Doc. 123] is **DENIED AS MOOT**.

Motion for New Trial on Defendant's Counterclaims

MassMutual has also moved for a new trial on its counterclaims, arguing that evidence central to the Field Practices' decisions and actions was improperly excluded at trial. Admission of this evidence, MassMutual contends, would show that defendants' counterclaims were well founded. Therefore, a new trial should be awarded on defendants' counterclaims [Doc. 133, 142].

As discussed above, it was the determination of the undersigned that the investigator's field investigation notes were untrustworthy hearsay and therefore inadmissible into evidence. MassMutual could have obtained testimony from the witnesses by bringing them into court but chose not to do so. MassMutual has the burden of proving its counterclaims by a preponderance of the evidence and it failed to do so.

Moreover, MassMutual's evidence did not support its claim of $11.4 Million in damages alleged as a result of Wolford's alleged misrepresentations on applications by coal miners. MassMutual's actuary James Sheehan testified that his estimate for the additional cost from Wolford's block of disability business was $11.4 Million.

However, of the 24 insureds utilized in his calculations, Wolford presented evidence that established 12 of those 24 were non-miners – pharmacists, accountants, lawyers, a retired judge, mining executives, etc. MassMutual failed to present evidence that Wolford made misrepresentations on the insurance applications, and further failed to show that it incurred the claimed losses as a result of insuring coal miners.

Accordingly, MassMutual's motion for new trial on its counterclaims [Docs. 133,142] is **DENIED**.

Conclusion

For the reasons hereinabove set forth, defendant's motions for judgment N.O.V. or in the alternative for new trial or remittitur, as amended [Docs. 118, 122, 143] are **DENIED**. Defendant's motion to amend, correct, and/or vacate judgment [Doc. 123] is **DENIED AS MOOT**. Plaintiff's motion to modify and amend the court's suggestion of remittitur [Doc. 138] is also **DENIED**.

Plaintiff is **DIRECTED** to notify the court within fifteen (15) days from the date of this opinion whether he accepts or rejects the suggestion of remittitur of the punitive damages verdict. If plaintiff rejects the suggestion of remittitur, then the court will conduct a new trial only on the amount of punitive damages as set out above.

IT IS SO ORDERED.

ENTER:

/s/ THOMAS W. PHILLIPS

Thomas W. Phillips
UNITED STATES MAGISTRATE
JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 01-5694 & 02-6336

LEON WOLFORD,
Plaintiff-Appellee,

v.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
Defendant-Appellant.

[Filed May 20, 2004]

ORDER

BEFORE: SILER, BATCHELDER, and COOK, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN

Leonard Green, Clerk

APPENDIX D

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court
(202) 479-3011

August 9, 2004

Mr. Cecil W. Laws
239 E. New Street
Kingsport, TN 37660

Re: Leon Wolford
v. Massachusetts Mutual Insurance Co.
Application No. 04A131

Dear Mr. Laws:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on August 9, 2004 extended the time to and including September 17, 2004.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
By
/s/ ANN MCCAMEY
Ann McCamey
Case Analyst

[attached notification list omitted]

APPENDIX E

Federal Rule of Civil Procedure 50 provides:

Rule 50. Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings

(a) Judgment as a Matter of Law.

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial; Conditional Rulings. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment – and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law; or

(2) if no verdict was returned:

(A) order a new trial, or

(B) direct entry of judgment as a matter of law.

(c) Granting Renewed Motion for Judgment as a Matter of Law; Conditional Rulings; New Trial Motion.

(1) If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered shall be filed no later than 10 days after entry of the judgment.

(d) Same: Denial of Motion for Judgment as a Matter of Law. If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee

is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.